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# PETITION AND TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1929~~ 1930

No. ~~700~~ 56

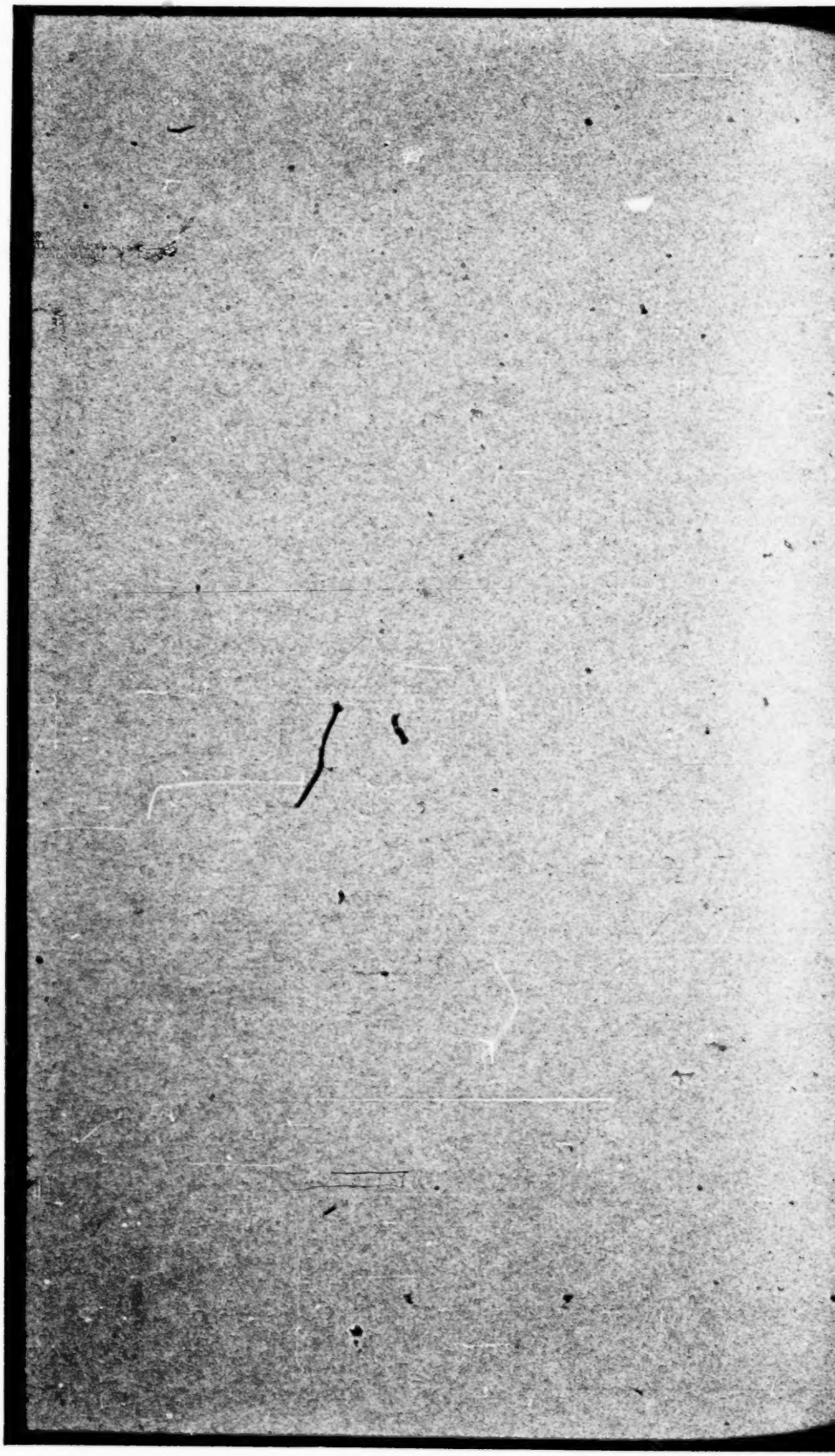
THE UNITED STATES, PETITIONER

vs.

SWIFT AND COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

**PETITION FOR CERTIORARI FILED FEBRUARY 28, 1930**
**CERTIORARI GRANTED MARCH 17, 1930**



# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1929

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## No. 700

## THE UNITED STATES, PETITIONER

vs.

## SWIFT AND COMPANY

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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In Supreme Court of the United States

October term, 1929. No. 700

THE UNITED STATES, PETITIONER, v. SWIFT AND COMPANY

*Petition for a writ of certiorari to the Court of Claims*

The Attorney General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case in favor of the respondent for $498,961.29 on May 6, 1929. On July 5, 1929, the United States filed a motion for a new trial which was denied on December 2, 1929.

STATEMENT

This is a suit to recover income and profits taxes assessed against the respondent for the taxable year 1917 and collected from it by means of the application against the assessment of a credit for an overpayment of income and profits taxes for the taxable year 1918.

It is admitted that the respondent should recover the sum sued for, $498,961.29, provided its claim for refund of the tax involved was filed within the time required by law; that is, within four years from the date of the payment of the tax. Inasmuch as payment of the 1917 tax was effected by a credit, the case turns on the date of the allowance of the credit.

2 The case was tried on a stipulation of facts from which the Court of Claims made special findings substantially as follows:

On February 28, 1923, within the statutory period of limitation, the respondent filed a claim for refund of income and excess-profits taxes for the year 1917 in the sum of $844,695.54. (Finding VII, Ex. A.) In this claim it was contended inter alia that a dividend of $2,068,000 received from the Compania Swift de Montevideo, a foreign corporation, should be taxed at 1916 rates instead of at 1917 rates. (Finding VIII.) This claim was rejected on April 24, 1926. (Finding VIII.)

On September 3, 1927, the respondent filed what was described as an amended claim for the refund of income and excess-profits taxes for 1917 in the sum of $498,961.29 based upon the contention that the dividends of $2,068,000 received from the Compania Swift de Montevideo were stock dividends and not taxable. (Finding IX, Ex. B.) The latter claim has not been acted upon by the commissioner. (Finding XV.)

The amount sought to be recovered in the latter claim and in this suit was paid in 1923 through the application of the credit of an overpayment of 1918 tax. (Findings X, XI, XVI.) On February 9, 1923, the commissioner, in accordance with the proce-

dure then in effect, signed and forwarded to the collector of internal revenue at Chicago a schedule of reductions of tax liability, Form 7777, in which was included an overassessment of income and profits taxes for the year 1918 against the respondent in the sum of $10,304,753.94 and at the same time forwarded to the collector undated certificates of overassessment addressed to the respective taxpayers named in the schedule. (Findings XI, XII.) The certificate of the commissioner on Form 7777 directed the collector to check the accounts of the taxpayers whose names appeared on
3 the schedule to determine whether or not their liabilities should be reduced by abatements, and if so, to make such abatements. With reference to refunds and credits he directed the collector as follows (Finding XI):

"If any part of the tax is found to be an overpayment, you will examine all accounts of the taxpayer for subsequent periods and apply such overpayment as a credit against the tax owing (if any) on the taxpayer's account for subsequent periods. (This applies to income, war profits, and excess profits taxes only.)

"The balance (if any) of the overpayment shall be entered in column 12 and placed upon a schedule of refunds (Form 7777A) and an appropriate memorandum made upon the taxpayer's account."

Before the collector returned the schedule to the commissioner Form 7805A, a schedule of refunds and credits, was in use in place of the schedule of refunds, Form 7777A. (Findings XI, XIII.)

On July 25, 1923, the collector returned Form 7777 to the commissioner with Form 7805A, on which he reported that after abating a portion of the overassessment of $10,304,793.54 he had applied certain credits against taxes for other years and had applied $2,813,012.05 as a credit against an additional assessment for 1917, and that the balance remaining was refundable. (Finding XII.)

4 On September 6, 1923, Form 7805A was signed by the commissioner, the deputy commissioner having first signed it. The commissioner's certificate was directed to the disbursing clerk of the Treasury Department and authorized him to pay the refunds shown thereon and the accrued interest, if any. (Findings XI, XII.)

Under date of September 26, 1923, the certificate of overassessment addressed to the respondent was mailed to him, the certificate showing the amount of the overassessment which had been abated, credited, and refunded. (Finding XII.)

The Court of Claims held that payment of the 1917 tax occurred on September 6, 1923. This conclusion followed from holding that the allowance of the credit for the overpayment of 1918 taxes against the 1917 taxes was made when the commissioner signed the schedule of refunds and credits, Form 7805A, for transmission to the disbursing clerk. It rejected the respondent's contention that the second claim for the refund of 1917 taxes constituted an amendment of the first claim but found that the latter claim, filed September 3,

1927, was filed within four years of the time of the payment of the tax and hence within the limitation period prescribed in section 284 (b) (1) of the revenue act of 1926 (c. 27, 44 Stat. 9, 66, infra).

STATUTES INVOLVED

Revenue act of 1918 (c. 18, 40 Stat. 1057, 1083, 1085):

"SEC. 250. (b) As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252. * * *

"SEC. 252. That if, upon examination of any return of income made pursuant to this act, the act of August 5, 1909, entitled 'An act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' the act of October 3, 1913, entitled 'An act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' the revenue act
4a of 1916, as amended, or the revenue act of 1917, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: Provided, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer."

Revenue act of 1921 (c. 136, 42 Stat. 227, 264, 268):

SEC. 250. (b) Same as section 250 (b) of the revenue act of 1918, above quoted.

SEC. 252. Same as section 252 of the revenue act of 1918, above quoted.

Revenue act of 1926 (c. 27, 44 Stat. 9, 66):

"SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this act, the act entitled 'An act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the act entitled 'An act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' approved October 3, 1913, the revenue act of 1916, the revenue act of 1917, the revenue act of 1918, the revenue act of 1921, or the revenue act of 1924, or any such act as amended, the amount

of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

"(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

"(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior act, unless before the expiration of such period a claim therefor is filed by the taxpayer; * * *." (U. S. C. App., Title 26, sec. 1065.)

## ASSIGNMENTS OF ERROR

1. The Court of Claims erred in holding that the credit of an overpayment of income and profits taxes for one year against taxes due for another year was allowed when the Commissioner of Internal Revenue signed a subsidiary schedule of refunds and credits, Form 7805A (September 6, 1923), directing the disbursing clerk of the Treasury to pay the amounts listed thereon as refundable.

2. The Court of Claims erred in not holding that such credit was allowed when the commissioner signed the certificate on the schedule of overassessments, Form 7777 (February 9, 1923), stating that he had allowed the overassessments appearing thereon and directing the collector of internal revenue to apply any overassessments found to be overpayments against any taxes due for other years.

3. The Court of Claims erred in holding that a claim for refund of the 1917 taxes involved in this suit was filed within four years after payment of the 1917 taxes was made through the allowance of a credit against them for an overpayment of 1918 taxes.

## REASONS FOR GRANTING THE WRIT

The question whether a credit is allowed when the Commissioner of Internal Revenue certifies the schedule of overassessments for transmission to the collector of internal revenue or when he signs the subsidiary schedule of refunds and credits for transmission to the disbursing clerk is the same question that is involved in United States v. Boston Buick Company and United States v. Iron Cap Copper Company, now pending before this court on petition for certiorari (Nos. 632, 633). In those cases the question is material in connection with the computation of interest on credits, whereas here it arises in connection with a statute of limitations, but plainly the date of the allowance of a credit must be the same for both purposes. If petition for certiorari is granted in the Boston Buick Company and Iron Cap Copper Company cases, it is important and necessary that a writ of certiorari also issue in this case in order to

preserve the rights of the Government pending decision by this Court of the latter two cases. The arguments made in the brief in support of the petition for writs of certiorari in those cases apply equally to the instant case, and reference is made to such brief.

Wherefore it is respectfully submitted that this petition should be granted.

WILLIAM D. MITCHELL,
*Attorney General.*

MARCH, 1930.

6 In Court of Claims of the United States

No. J-226

SWIFT AND COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

I. *Petition*

Filed April 21, 1928

To the honorable the CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE COURT OF CLAIMS OF THE UNITED STATES:

The plaintiff sues the defendant and for a cause of action respectfully states:

I

The plaintiff is, and at all the times in question was, a corporation organized and existing under the laws of Illinois with its principal office and place of business at the city of Chicago, in that State.

7 It has at all times borne true allegiance to the Government of the United States and has never taken part in rebellion or insurrection against it. It is the sole owner of the claim hereinafter set forth, and no assignment or transfer thereof or of any interest therein has been made.

At all the times in question it was engaged, directly, or through affiliated corporations and other business units, in the buying of cattle, sheep, and hogs, and converting these into fresh and cured meats for human consumption, and in the distribution and sale of the same; also, in the distribution and sale of poultry and eggs; in the manufacture, distribution, and sale of lard, butter cheese, oleomargarine, oleo oil, cotton seed oil, animal feeds, soap, tallow, glue, and fertilizer; in the preparation, distribution, and sale of hides, sheepskins, and wool; in the tanning, distribution, and sale of leather; and in the operation of stockyards, and refrigerator transportation lines. Its business extended to every part of the

United States, and also to Europe, South America, and other foreign parts.

II

Compania Swift de Montevideo, S. A., was at all the times in question a juridical entity, corresponding with our corporation, created, and existing under the laws of Uruguay.

III

At the close of business, December 31, 1916, the Compania
8 Swift of Montevideo had a capital of 2,000,000 pesos, gold, divided into 20,000 shares of 100 pesos each, all owned by the plaintiff; also a surplus of 20,072,724.03 pesos, gold, nearly all invested in plant extensions and other fixed assets required in the company's business.

IV

On December 31, 1916, 2,000,000 pesos of this surplus was set aside by appropriate journal and ledger entries as a "reserve for increase of capital to be effected."

V

On January 15, 1917, in compliance with a cablegram from the plaintiff advising an "increase of capital * * * by stock dividend" equal to the amount of this reserve, "no cash dividend to be declared," the directors of Compania Swift de Montevideo, passed a resolution to submit to the shareholders a proposal to capitalize 2,000,000 pesos of the company's surplus by increasing its capital from 2,000,000 pesos to 4,000,000 pesos, gold, divided into 40,000 shares of 100 pesos each, and called a shareholders' meeting for that purpose.

VI

At the shareholders' meeting, held March 24, 1917, this proposal was adopted, the resolution reciting "that the new issue of shares should be made immediately, giving preference to the present share-
holders, the subscribers to pay in the total amount as soon as
9 the Directors may deliver the shares." On March 31, 1917, the increase of capital stock was approved by the Minister of Finance of Uruguay.

VII

On April 5, 1917, by appropriate journal and ledger entries, the 2,000,000 pesos reserved out of the surplus on hand at the close of 1916 for the anticipated increase of capital was transferred on the books of the company to the capital account, and on or about April 21, 1917, certificates representing the new shares of capital stock were

duly issued, signed by the president, the secretary, and a member of the board of directors, and with the required stamps attached.

## VIII

On June 25, 1917, the shareholders' annual meeting was held, and the minutes recite that "the meeting decided to distribute a dividend of 100 per cent," i. e., 2,000,000 pesos (being the amount of the new shares of capital stock) out of the surplus of 2,072,724.03 pesos on hand at the close of 1916, without expressly stating whether it was to be payable in cash or in the new shares.

All but a very small amount of the surplus out of which this dividend was declared was, as aforesaid, in the form of fixed assets required in the company's business, and consequently did not admit of a dividend payable in cash. Besides, as just stated, 2,000,000 pesos of this surplus had already been transferred to the
10 company's capital account and new shares of capital stock issued against it, and therefore was no longer surplus at all at the time of the declaration of the dividend. No payment on account of the dividend was in fact made in cash or by check at any time.

## IX

Subsequently the certificates representing the 2,000,000 pesos of new shares were delivered to the plaintiff as sole shareholder and were entered on the books of the plaintiff in the result account of the Compania Swift de Montevideo as a stock dividend, the entry reading "1917, Sep. 29, stk. div. J90, [$]2,068,000."

## X

This stock dividend of 2,000,000 pesos, equal to $2,068,000, was erroneously included as income in the plaintiff's return of net income for the taxable year 1917, by reason whereof the income and war excess-profits taxes assessed against and collected from the plaintiff for that year exceeded the amount lawfully owing by $498,961.29.

## XI

On February 28, 1923, which was within five years from the date when its return for 1917 was due, the plaintiff filed a claim for refund of income and war excess-profits taxes paid for that year on the ground amongst others of "Foreign dividends overstated." A copy thereof is annexed as Exhibit A.

11–12 On September 3, 1917, which was within four years from the date of collection from it of $2,813,021.05 of income and war excess-profits taxes for 1917, the plaintiff filed an amendment of this claim setting up as a specific ground for refund that the beforementioned item of $2,068,000 included as income in its return for 1917

was not income but a stock dividend and therefore not taxable. A copy thereof is annexed as Exhibit B.

## XII

No decision on the claim as amended has been rendered by the Commissioner of Internal Revenue, nor has any portion of the aforesaid overassessment been refunded or credited to the plaintiff.

## XIII

Wherefore the plaintiff prays judgment against the United States for $498,961.29, with interest as provided by law.

SWIFT AND COMPANY,
By G. CARROLL TODD,
*Attorney for Plaintiff,*
*1001 15th Street NW., Washington, D. C.*

[*Duly sworn to by G. Carroll Todd; jurat omitted in printing.*]

13 *Exhibit A to petition*

507143

[Treasury Department, Internal Revenue Service. Form 843—Jan., 1922. Comptroller General U. S. January 18, 1922]

[3800. IMPORTANT: File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in]

Inventoried 3-17-24

CLAIM FOR

- ☐ ABATEMENT OF TAX ASSESSED
- ☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS
- ☒ REFUND OF TAXES ILLEGALLY COLLECTED
- ☐ REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

NOTICE TO COLLECTOR: Collector must indicate in block above the kind of claim, except in income-tax cases.

Collector's notation: Date received, Feb. 28. Date received by Administrative Unit, Mar. 31, 1923. Claims Control Section.

STATE OF ILLINOIS,
*County of Cook, ss:*

Swift & Company (Illinois) and affiliated companies.
Union Stock Yards, Chicago Ill.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named.

and that the facts given below with reference to said statement are true and complete:

| | Period Year |
|---|---|
| | From: January 1, 1917 |
| | To: December 31, 1917 |
| 1. Business is which engaged: General meat packing. | |
| 2. Character of assessment or tax: Income and excess-profits taxes. | |
| 3. Amount of assessment or stamps purchased | $ |
| 4. Reduction of tax liability requested (income and profits tax) | 844,695.54 |
| 5. Amount to be abated | |
| 6. Amount to be refunded (or such greater amount as is legally refundable) | 844,695.54 |
| 7. Dates of payment (see collector's receipts or indorsements of canceled checks) | |
| (If statement covers income tax liability, items 8–11, inclusive, must be answered.) | |
| 8. District in which return (if any) was filed: 1st Illinois. | |
| 9. District in which unpaid assessment appears | |
| 10. Amount of overpayment claimed as credit | |
| 11. Unpaid assessment against which credit is asked: Period from ____ to ____ | |

Deponent verily believes that this application should be allowed for the following reasons:

Because of corrections in invested capital and income on account various items not heretofore under consideration between the company the Revenue Bureau, among which are the following:

Allocation of capital-stock tax.

Allocation of profits from barque "Hillstrom."

Depreciation based upon corrected values and overtime use.

Branch-house reap'r'is. erroneously charged to depreciation re retirement of bonds.

Foreign-exchange adjustments and foreign dividends overstated.

Full details in support of this claim are being filed with the Revenue Bureau in Washington in connection with the audit made by the bureau for the years 1917, 1918, and 1919.

(Signed) SWIFT & COMPANY.
W. W. SHERMAN,
*Assistant Treasurer.*

Sworn to and subscribed before me this 28th day of February, 1923.

DOROTHY I. OTTON,
*Notary Public.*

14 *Exhibit B to petition*

[Treasury Department, Internal Revenue Service. Form 843—Jan., 1922. Comptroller General, U. S. January 18, 1922]

[IMPORTANT: File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in]

## Amendment of claim filed February 28, 1923

[Execute separate form for each tax period]

AMENDED CLAIM FOR

- ☐ ABATEMENT OF TAX ASSESSED
- ☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS
- ☒ REFUND OF TAXES ILLEGALLY COLLECTED
- ☐ REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

NOTICE TO COLLECTOR: Collector must indicate in block above the kind of claim, except in income-tax cases.

STATE OF ILLINOIS,
*County of Cook, ss:*

Swift & Company (a corporation of Illinois),
Union Stock Yards, Chicago, Illinois.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

| | Period | Year |
|---|---|---|
| From: | Jan. | 1, 1917. |
| To: | Dec. | 31, 1917. |

1. Business in which engaged: General meat packing.
2. Character of assessment or tax: Income and war excess-profits tax.
3. Amount of assessment or stamps purchased ..... $.....
4. Reduction of tax liability requested (income and profits tax) .. $498,961.29
5. Amount to be abated ..... $.....
6. Amount to be refunded (or such greater amount as is legally refundable) ..... $498,961.29
7. Dates of payment (see collector's receipts or indorsements of canceled checks) .....
   (If statement covers income-tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed: First Illinois.
9. District in which unpaid assessment appears .....
10. Amount of overpayment claimed as credit ..... $.....
11. Unpaid assessment against which credit is asked:
    Period from ..... to ..... $.....

Deponent verily believes that this application should be allowed for the following reasons:

In deponent's return of income for 1917, upon which income and war excess-profits taxes were assessed against it and collected, there

was erroneously included a dividend received from the Compania Swift de Montevideo, S. A., Uruguay, amounting to $2,068,000.00, which was not income within the meaning of the law, but a stock dividend, and therefore not taxable.

The erroneous inclusion of the amount of this dividend in the income upon which income and war excess-profits taxes were assessed against and collected from the deponent for the year 1917 caused the amount of such taxes so assessed and collected to exceed by $498,961.29, more or less, the amount lawfully owing by deponent.

Deponent paid the income and war excess-profits taxes assessed against it for the year 1917 on different dates. One such payment, $2,813,012.05, was made on September 6, 1923.

(Signed) W. W. SHERMAN,
*Assistant Treasurer.*

Sworn to and subscribed before me this 31st day of August, 1927.

(Signed) F. O. CLARK,
*Notary Public.*

15 II. *General traverse*

Filed May 31, 1928

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

HERMAN J. GALLOWAY,
*Assistant Attorney General.*

F. K. D.

III. *Argument and submission*

On April 6, 1929, this case was argued and submitted on merits by Mr. G. Carroll Todd for the plaintiff and by Mr. Fred K. Dyar for the defendant.

16 IV. *Special findings of fact, conclusion of law, and opinion of the court by Moss, J.*

Filed May 6, 1929

This case having been heard by the Court of Claims upon a stipulation of facts, signed on behalf of the plaintiff by G. Carroll Todd, and on behalf of the defendant by Assistant Attorney General Herman J. Galloway, the court on said stipulation makes the following

*Special findings of fact*

I

The plaintiff is, and at all times in question was, a corporation organized and existing under the laws of Illinois, with its principal office and place of business at the city of Chicago in that State.

It has at all times borne true allegiance to the Government of the United States and has never taken part in rebellion or insurrection against it. It is the sole owner of the claim hereinafter set forth, and no assignment or transfer thereof or of any interest therein has been made.

At all the times in question it was engaged in the buying of cattle, sheep, and hogs, and converting these into fresh and cured meats for human consumption, and in the distribution and sale of the same; also, in the distribution and sale of poultry and eggs; in the manufacture, distribution, and sale of lard, butter, cheese, oleomargarine, oleo oil, cottonseed oil, animal feeds, soap, tallow, glue, and fertilizer; in the preparation, distribution, and sale of hides, sheepskins, and wool; in the tanning, distribution, and sale of leather; and in the operation of stockyards and refrigerator transportation lines. Its business extended to every part of the United States, and also to Europe, South America, and other foreign parts.

II

Compania Swift de Montevideo, S. A., was at all the times in question a corporation, created and existing under the laws of Uruguay.

III

At the close of business, December 31, 1916, the Compania Swift de Montevideo had a capital of 2,000,000 pesos, gold, divided
17 into 20,000 shares of 100 pesos each, all owned by the plaintiff; also a surplus of 2,072,724.03 pesos, gold, nearly all invested in plant extensions and other fixed assets required in the company's business.

IV

By proceedings duly taken in January-April, 1917, the Compania Swift de Montevideo converted into capital 2,000,000 pesos of this surplus by means of a stock dividend; i. e., that amount was transferred from the surplus account to the capital account and 20,000 additional shares of capital stock of 100 pesos each were issued against it. The certificates representing the additional shares were delivered to the plaintiff as sole shareholder.

V

This stock dividend of 2,000,000 pesos, equal to $2,068,000, was included as income in the plaintiff's return of net income for the taxable year 1917 on which income and war excess-profits taxes were assessed and collected. Thereafter the Supreme Court of the United States decided that stock dividends are not income and therefore were not taxable under the acts of Congress imposing income and war excess-profits taxes.

VI

By reason of the erroneous inclusion of this stock dividend as income in the plaintiff's return of net income for the taxable year 1917 the amount of income and war excess-profits taxes assessed against it and collected from it for that year exceeded the amount lawfully owing by $498,961.29.

VII

On February 28, 1923, which was within the statutory period of limitations for filing claims for refund, the plaintiff filed a claim for refund of income and war excess-profits taxes paid for the year 1917. A copy thereof is annexed to the petition as Exhibit A and by reference is made a part hereof.

VIII

Under the said claim for refund filed by the plaintiff on February 28, 1923, the plaintiff contended before the Commissioner of Internal Revenue, amongst other things, that under § 1211 of the revenue act of 1917, as construed by the Circuit Court of Appeals for the Second Circuit in Douglas v. Edwards (298 Fed. 229), certain dividends received by it in 1917 from various foreign corporations, including the dividend of $2,068,000 received from the Compania Swift de Montevideo, should not, as the commissioner maintained, be included in its income for 1917, to the extent of its net earnings for that year, but that, having been specifically declared out of earnings for 1916 and prior years, and the net earnings for those years having been sufficient for the purpose, such dividends should be treated as income for those years, respectively. The decision of the Circuit Court of Appeals in Douglas v. Edwards, supra, was reversed by the Supreme Court on November 23, 1925. On April 24, 1926, the plaintiff's aforesaid contention was overruled by the Commissioner of Internal Revenue. The contention that the said dividend of $2,068,000 was a stock dividend was not made before the Commissioner of Internal Revenue under said claim for refund filed February 28, 1923.

## IX

On September 3, 1927, the plaintiff filed what was described as an amended claim for refund of income and war excess profits taxes paid for the year 1917. A copy thereof is annexed to the petition as Exhibit B and by reference is made a part hereof.

## X

Additional income and war excess profits taxes to the amount of $2,813,012.05 assessed against the plaintiff for the taxable year 1917 were collected by applying as a credit against them pro tanto an overpayment by the plaintiff of income and war excess-profits taxes for the taxable year 1918, as hereinafter set forth.

## XI

At the time this credit was allowed the procedure in the Bureau of Internal Revenue with respect to crediting or refunding overassessments of income and war excess profits taxes was as follows:

Upon determination by the Commissioner of Internal Revenue that there had been an overassessment of such taxes for any period a certificate of overassessment was prepared addressed to the taxpayer and showing the amount of the overassessment, but it was not dated or forwarded to the taxpayer at that time. From time to time as these overassessments were determined they were listed by districts in schedules of reduction of tax liability (Form 7777, which was the form then in use), later called schedules of overassessments. Each such schedule was signed by the Commissioner of Internal Revenue and forwarded to the collector of internal revenue for the proper district with instructions reading as follows:

"The several amounts herein noted as reduction of tax liability are hereby approved and allowed.

"You will immediately check the items herein against the accounts of the several taxpayers and determine whether the several amounts in which the tax liability has been reduced should be abated in whole or in part and make such abatement as may be warranted by the condition of the taxpayer's account for the year involved.

"If any part of the tax is found to be an overpayment, you will examine all accounts of the taxpayer for subsequent periods and apply such overpayment as a credit against the tax owing (if any) on the taxpayer's account for subsequent periods. (This applies to income, war-profits and excess-profits taxes only.)

"The balance (if any) of the overpayment shall be entered in column 12 and placed upon a schedule of refunds (Form 7777A) and an appropriate memorandum made upon the taxpayer's account.

19 "You will thereupon complete and certify this schedule and Schedule 7777A and return three copies of each to the Com-

missioner of Internal Revenue at Washington, making the appropriate entries in your accounts."

(At the time here in question the schedule of refunds, Form 7777A, referred to in the last two paragraphs of these insrtuctions, had been changed to a schedule of refunds and credits, Form 7805A.)

The certificates of overassessment addressed to the taxpayers named on the schedule were forwarded to the collector at or about the same time that the schedules of reduction of tax liability (Form 7777) were forwarded.

If in any case the collector found that no part of the overassessment had been paid, the whole thereof was abated and the certificate of overassessment was filled in accordingly and dated and mailed directly to the taxpayer by the collector.

If the collector found that all taxes previously assessed had been paid and that, therefore, the overassessment was an overpayment as well, and if he found that the taxpayer owed taxes for other periods, he entered on the schedule of overassessments under the heading, "Credit (amount)," whatever amount, within the limits of the overpayment, the taxpayer owed, and under the heading, "Account to be credited," a reference to the proper assessment list. A like entry was made on the schedule of refunds and credits (Form 7805A) under the heading, "Amount credited." In addition, the collector made an appropriate entry in the accounts of the taxpayer.

The balance of the overassessment, if any, was entered by the collector on the schedule of overassessments under the heading "Net amount refundable" and on the schedule of refunds and credits under the same heading. In addition, the collector made an appropriate entry in the accounts of the taxpayer.

Thereupon the collector returned the completed schedule of overassessments and the completed schedule of refunds and credits to the Commissioner of Internal Revenue, together with the certificates of overassessment addressed to the taxpayers named on the schedule of refunds and credits. The schedule of refunds and credits was signed by the Deputy Commissioner of Internal Revenue, and then transmitted to the Commissioner of Internal Revenue, who signed it under an inscription reading as follows: "To the disbursing clerk, Treasury Department: The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due. Payment may, therefore, be made in the amounts shown in column 7. Date _____."

The certificates of overassessment in the cases involving credits were held in the office of the commissioner until warrants were issued by the disbursing clerk of the Treasury Department for the actual refunds of taxes appearing on the same schedule of refunds and credits returned by the collector. Thereupon the certificates of overassessment covering refunds, and interest, if any, together with warrants for the amount thereof, and the certificates of overassess-

ment covering credits, together with warrants for the amount of interest, if any, on said credits, were dated and returned to the collector for mailing to the taxpayers.

No other communication was given by the commissioner to the taxpayer of the allowance of a credit or refund.

## XII

In accordance with the procedure set forth in Finding XI above, the Commissioner of Internal Revenue, under date of February 9, 1923, signed and forwarded to the collector of internal revenue for the first district of Illinois a schedule of reductions of tax liability (Form 7777), in which was included an overassessment of income and war excess-profits taxes for 1918 against the plaintiff in the amount of $10,304,753.94, and at the same time forwarded to the collector undated certificates of overassessment addressed to the respective taxpayers named in said schedule and showing the amount of the overassessment against each. On July 25, 1923, the collector returned this schedule to the commissioner together with a schedule of refunds and credits (Form 7805A). With respect to the overassessment of $10,304,753.94 against the plaintiff, the collector's report showed an overpayment of $4,953,575.50 (the balance of the overassessment having been abated); that out of this overpayment the following amounts were entered as credits against taxes due for other periods, namely, $194,095.33, $2,813,012.05, $72,866.22, $3,158.81, $1,099,790.57, and $35,624.42; and that the balance, $735,028.10, was refundable. The item of $2,813,012.05 was the amount of an additional assessment of income and war excess-profits taxes for 1917, as shown in "List, page, and line, 1920–6/155/5–23–B," and referred to in Finding X above. At the same time that these schedules were forwarded by the collector to the commissioner the collector returned to the commissioner the certificates of overassessment in the cases of the taxpayers named on the schedule of refunds and credits, including the plaintiff.

Thereafter, under date of September 6, 1923, the schedule of refunds and credits (Form 7805A) was signed by the commissioner, the deputy commissioner having first signed it; and under date of September 26, 1923, the certificate of overassessment addressed to the plaintiff, showing the amount of the overassessment, and the portion thereof that had been abated, the portion that had been allowed as a credit, and the portion that had been allowed as a refund, was mailed to the plaintiff, and was duly received.

## XIII

Treasury Forms 7777 and 7777A, schedule of reductions of tax liability and schedule of refunds, respectively, were in use by the Bureau of Internal Revenue from February, 1922, to February, 1923. Treasury Forms 7805 and 7805A, schedule of overassessments and allowance abatements, credits, refunds, and related claims, if any,

and schedule of refunds and credits, respectively, were in use by said bureau from February, 1923, to December, 1926. Treasury Form 7920, schedule of overassessments, abatements, credits, and refunds has been in use by said bureau from December, 1926, to date. In conformity with the practice existing at the time, Forms 7777 and 7805A, and none others, were used in the present case.

21 XIV

Treasury instructions relative to refunds, credits, and abatements were duly issued in Treasury Decision 3260, SOC-mimeograph, collectors' No. 2894, bureau memorandum No. 175, SOC-mimeograph, collectors' No. 2931, and SOC-mimeograph, collectors' No. 2969. Treasury Decision 3260 is published in volume 23 of the Treasury Decisions relating to internal revenue, and in Internal Revenue Cumulative Bulletin No. 5, at page 243, and may be referred to therein with the same effect as if made a part hereof. Pertinent portions of the other instructions referred to are set out in Exhibits I, J, K, and L, respectively, annexed hereto, and made a part hereof.

XV

No decision has been rendered by the Commissioner of Internal Revenue on the aforesaid claim for refund filed by the plaintiff on September 3, 1927. Nor has any portion of the aforesaid payment by the plaintiff of $498,961.29 on account of income and war excess-profits taxes for the taxable year 1917 in excess of the amount properly due (Finding VI, above) been refunded or credited to the plaintiff.

XVI

If the claim for refund filed February 28, 1923, either alone or in connection with the claim filed September 3, 1927, is sufficient in law, or if the claim filed September 3, 1927, independently of and apart from the claim filed February 28, 1923, was filed within the time required by law, there is due and owing the plaintiff on account of overpayment by it of income and war excess-profits taxes for the taxable year 1917 a refund of $498,961.29, together with interest at the rate of 6 per cent per annum from the date of the overpayment, September 6, 1923, to wit, the date on which the credit of $2,813,012.05 referred to in Finding X above, became effective.

*Conclusion of law*

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $498,961.29, with interest at the rate of 6 per cent per annum from September 6, 1923, to date of judgment. It is therefore adjudged and ordered

that the plaintiff recover of and from the United States the sum of four hundred ninety-eight thousand, nine hundred sixty-one dollars and twenty-nine cents ($498,961.29), together with interest thereon at the rate of 6 per cent per annum from September 6, 1923, to such date as the Commissioner of Internal Revenue may determine, in accordance with the provisions of subsection (b), section 177 of the Judicial Code, being a part of the revenue act of May, 1928.

*Opinion*

Moss, Judge, delivered the opinion of the court:

This action is for the recovery by plaintiff of an admitted overpayment of its income and war-profits taxes for the taxable
22 year 1917 in the sum of $498,961.29, with interest from the date of such overpayment. Plaintiff included in its tax return for 1917 the value of stock dividends received amounting to $2,068,000. It filed a claim for refund on February 28, 1923, alleging as a ground for the refund that the stock dividends in question should have been allocated to other years than 1917, which claim was rejected. Thereafter the United States Supreme Court decided that the value of stock dividends did not constitute taxable income, and on September 3, 1927, plaintiff filed a second claim for refund, which it designated as an amended return, and sought the refund of said sum on the ground that said stock dividends did not constitute taxable income. The Commissioner of Internal Revenue determined that the latter claim was barred by the statute of limitations, and rejected same.

We are unable to agree with plaintiff's first contention that the second claim should be construed as an amendment to the first. As stated above, the sole ground relied upon in the first claim with reference to said stock dividends was that they should have been allocated to other years than 1917. It contained no suggestion that the value of said dividends did not constitute taxable income. (Feather River Lumber Co. v. United States, decided in this court May 28, 1928; Jonesboro Grocer Co. v. United States, decided December 3, 1928.)

With reference to the second claim, it is admitted that if said claim was filed within the time required by law plaintiff should recover the sum sued for, $498,961.29; and this question, in turn, depends upon the proper determination of the question as to when a credit is allowed within the meaning of the statutes on the subject.

Section 252 of the revenue act of 1921 (42 Stat. 268) provided, with reference to crediting or refunding overpayments of income, war-profits, and excess-profits taxes collected under the revenue act of 1917:

"That if, upon examination of any return of income made pursuant to this act, * * * the revenue act of 1917, or the revenue act of 1918, it appears that an amount of income, war-profits, or excess-profits tax has been paid in excess of that properly due, then,

notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits, or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: Provided, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: * * *."

Section 284 (b) (1) of the revenue act of 1926 (44 Stat. 66) provided:

"No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior act, unless before the expiration of such period a claim therefor is filed by the taxpayer; * * *."

23 The payment of this tax was accomplished by the allowance of a credit against an overassessment. The claim must therefore have been filed within four years from the date on which the allowance of this credit was made. Finding XII in the agreed findings of fact sets forth the steps taken leading up to the allowance of the credit in this case.

It is the contention of the Government that the credit was allowed on February 9, 1923, when the Commissioner of Internal Revenue certified the overassessment to the collector. This contention seems to be based on the decision in the Penn Smokeless Coal Co. v. United States, in the District Court of the United States for the Western District of Pennsylvania, decided January 3, 1929. It will be noticed that the real controversy in that case was over the question as to when the credit was "taken." It was agreed between counsel, as shown by the briefs, that "a credit is allowed when the Commissioner approves the schedule of overassessments for transmission to the proper accounting officer for credit." That point was therefore not the subject of argument. We think counsel were in error in agreeing that such was the correct principle. At any rate, it should be noticed that the court itself fell into an unfortunate error in its discussion of the case. It is stated:

"In Girard Trust Company v. United States, supra (270 U. S. 163), the court, in the opinion of Mr. Chief Justice Taft, laid down a rule as follows: '*A claim for refund or credit is allowed within the meaning of the statute when the commissioner approves the schedule in whole or in part for transmission to the proper accounting officer for credit or refund.* * * *' Applying the rule laid down in Girard Trust Company v. United States to the actual procedure in the Bureau of Internal Revenue, the credit to the plaintiff was allowed when the commissioner approved the schedule of overassessments on January 13, 1926, for transmission to the collector." (Italics ours.)

The matter quoted above was not a rule laid down by Chief Justice Taft. It was a reference by the Chief Justice to a Treasury regulation and was cited only for the purpose of expressing his emphatic disapproval of the principle embodied therein, which he did in the following language:

"We can not concur, however, in the view of the Treasury Department that the date of the allowance of the claim as intended by the statute is the date when the commissioner first decides that there has been an overassessment and sends upon a proper form his decision to the collector of internal revenue who made the collection and keeps the account with the taxpayer."

Inasmuch as the decision in the Penn Smokeless Coal Co. case is based, in a large measure, upon a palpably erroneous premise it must be considered as of questionable value as a precedent in the present case.

It should be observed that the Government made the same contention, on the point under discussion, in the Girard Trust Company case. It is true that only refunds were directly involved in the Girard Trust Company case, but the court seems to have placed credits and refunds on the same footing, so far as the date of
24 allowance is concerned. In defining what constitutes an allowance of a claim for refund or credit, the court stated:

"The Commissioner of Internal Revenue is the final judge in the administrative branch of the Government to decide that an overassessment has been made and that a refund or credit should be granted, and when he has made that decision *finally*, he has allowed the claim for the refund or credit of the taxes paid within the meaning of the section." (Italics ours.)

The Government in its brief presented that case on the theory that no difference existed between a credit and a claim for refund in the matter of the date of the allowance. It is stated in said brief:

"* * * and the date of the allowance of the claim, that is, the date of adjudication of his right to credit or refund, remains the date of the approval of the original schedule."

The schedule is nothing more nor less than a statement of credits as well as refunds found by the collector to be due the taxpayers named therein. The opinion in the Girard Trust Company case, supra, referring to the collector's report as to the amount which should be credited on taxes due for other years, and the amount to be refunded, states (p. 171): "that this is examined by the assistant commissioner and then is delivered to the commissioner, who *makes it effective by his approval*." (Our italics.)

The commissioner "is the final judge in the administrative branch of the Government to decide * * * that a refund or credit should be granted." No other administrative officer has such authority. The commissioner's decision that there has been an overassessment is one thing; the determination that there has been an overpayment is quite another. This can not be determined by the commissioner until he is informed by the collector what part, if any, of the

overassessment had been paid, and what part, if any, had been abated. In the case of Boston Buck Company v. United States, 27 Fed. (2d) 395, the question as to when a credit is allowed was directly involved. The Government contended there, as it has done in the instant case, that, notwithstanding the decision in the Girard Trust Company case, supra, the date of the allowance of a credit is the date on which the commissioner transmits to the collector a schedule of overassessments. The court held that " in view of Girard Trust Company v. United States, supra, it can be taken as settled that the transmission of the schedule of overassessments does *not* constitute an allowance of either a *credit* or a *refund*." (Our italics.) The court expressed the opinion that there might be some ground for differentiating between a refund and a credit, and suggested that the date on which the collector enters the credit on his books might be regarded as the date of the allowance of the credit. There being no necessity in that case for a more exact determination, the court concluded the whole question by stating that " it is sufficient to decide that the credit was not allowed on March 14, 1924, when the schedule of overassessments was forwarded to the collector at Boston." The suggestion of the court to the effect that the date of the entry of the credit by the collector might be considered as the date of the allowance of the credit is not sound, for the particular reason that the collector has no authority to allow either
25 refunds or credits, that authority being vested in the commissioner, and being judicial in nature, it can not be delegated to the collector.

We have reached the conclusion that the credit involved herein was allowed within the meaning of the statute when the commissioner signed the schedule of refunds and credits as reported by the collector, which was September 6, 1923, and within four years from the filing of the second claim for refund. Plaintiff is entitled to a judgment, and it is so adjudged and ordered.

SINNOT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, Chief Justice, concur.

26

## V. *Judgment*

At a Court of Claims held in the city of Washington on the 6th day of May, A. D. 1929, judgment was ordered to be entered as follows:

It is adjudged and ordered that the plaintiff recover of and from the United States the sum of four hundred ninety-eight thousand, nine hundred sixty-one dollars and twenty-nine cents ($498,961.29), together with interest thereon at the rate of 6 per cent per annum from September 6, 1923, to such date as the Commissioner of Internal Revenue may determine, in accordance with the provisions of subsection (b), section 177, of the Judicial Code, being a part of the revenue act of May, 1928.

## VI. *Proceedings after entry of judgment*

On July 5, 1929, the defendant filed a motion for a new trial.

On December 2, 1929, the court entered the following order on said motion:

ORDER

It is ordered this 2d day of December, 1929, that the defendant's motion for new trial be and the same is overruled.

BY THE COURT.

27 [Clerk's certificate to foregoing transcript omitted in printing.]

[Indorsement on cover:] File No. 34,831. Court of Claims. Term No. 700. The United States, petitioner, vs. Swift and Company. Petition for writ of certiorari and exhibit thereto. Filed February 28, 1930. File No. 34,831.

U. S. GOVERNMENT PRINTING OFFICE: 1933

Supreme Court of the United States

*Order allowing certiorari*

Filed March 17, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

103810—30

FILE COPY

Office Supreme Court, U. S.
FILED
AUG 4 1930
CHARLES ELMORE CROPLEY
CLERK

No. 56

# In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES, PETITIONER

*v.*

SWIFT AND COMPANY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

**MOTION TO ADVANCE**

# In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 56

THE UNITED STATES, PETITIONER

*v.*

SWIFT AND COMPANY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

**MOTION TO ADVANCE**

Now comes the petitioner in the above-entitled cause by the Solicitor General, and moves to advance this case so that the following four cases may be heard consecutively:

No. 42, *United States, Petitioner,* v. *Boston Buick Company.*

No. 43, *United States, Petitioner,* v. *Iron Cap Copper Company.*

No. 56, *United States, Petitioner,* v. *Swift and Company.*

No. 113, *Pottstown Iron Company, Petitioner,* v. *United States.*

A motion to advance No. 113, *Pottstown Iron Company, Petitioner,* v. *United States,* for hearing

4429—30

immediately following *United States* v. *Iron Cap Copper Company*, No. 43, was allowed on June 2, 1930.

In support of this motion, counsel submits the following statement:

No. 42, *United States, Petitioner*, v. *Boston Buick Company*, is before this Court on writ of certiorari, granted March 17, 1930, to the Circuit Court of Appeals for the First Circuit. No. 43, *United States, Petitioner*, v. *Iron Cap Copper Company*, is before the Court on writ of certiorari, granted March 17, 1930, to the Circuit Court of Appeals for the First Circuit. No. 56, *United States, Petitioner*, v. *Swift and Company*, is before the Court on writ of certiorari, granted March 17, 1930, to the Court of Claims. No. 113, *Pottstown Iron Company, Petitioner*, v. *United States*, is before the Court on writ of certiorari, granted June 2, 1930, to the Court of Claims.

In the first three of these cases the issue is the date on which the allowance of a credit of an overpayment of income and excess-profits taxes against an underpayment for other years becomes effective as a payment. In Nos. 42 and 43 that date is decisive of the question whether interest on the credits should be computed under Section 1324 (a) of the Revenue Act of 1921, or under Section 1019 of the Revenue Act of 1924. In No. 56 that date is decisive of the question whether the claim for refund of the taxpayer was filed within the period of

limitation fixed by law, i. e. within four years from the date of the payment of the tax. As payment of the tax was effected by a credit, the case turns on the date of the allowance of the credit. In No. 113, that date is decisive of the question whether interest on the credit should be computed under Section 1019 of the Revenue Act of 1924 or under Section 1116 of the Revenue Act of 1926.

An additional question has been raised in No. 113, namely, as to when a credit is "taken" within the meaning of that term in the statute, if such taking is on some other date than the date on which the credit is allowed. In view of this additional question, it seems desirable to hear No. 113 last of the four cases.

Counsel for respondent in No. 56 and for petitioner in No. 113 concur in this motion.

Respectfully submitted.

THOMAS D. THACHER,
*Solicitor General.*

JULY, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

FILE COPY

No. 56

# In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES, PETITIONER

*v.*

SWIFT AND COMPANY

*ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

**BRIEF FOR THE UNITED STATES**

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# In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 56

THE UNITED STATES, PETITIONER

*v.*

SWIFT AND COMPANY

*ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the Court of Claims (R. 11) is reported in 68 C. Cls. 97, ~~33 F. (2d) 305~~.

### JURISDICTION

The judgment of the Court of Claims was entered on May 6, 1929. (R. 21.) A motion for a new trial was overruled on December 2, 1929. (R. 22.) Petition for certiorari was filed February 28, 1930 (R. 22), and certiorari was granted March 17, 1930 (R. 23). 281 U. S. 709. The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

## QUESTIONS PRESENTED

Suit was instituted to recover income and profits taxes assessed against the respondent for the year 1917 and paid by the application of credit from an overpayment of taxes for the year 1918. The respondent is entitled to recover the sum sued for, $498,961.29, provided its claim for refund of the tax involved was filed within the time required by Section 284 (b) (1) of the Revenue Act of 1926 (p. 16, *infra*); that is, within four years "from the time the tax was paid." Inasmuch as payment of the 1917 tax was effected by the application of a credit, the case turns on the date of payment by such application.

One question presented is whether the 1917 tax was paid when the Collector entered the application of the credit on his records or when he certified to the Commissioner that he had done this or when the Commissioner subsequently signed the schedule of refunds and credits authorizing the refund of that part of the overpayment not used as a credit.

The respondent filed two claims for refund—one on February 28, 1923, and another on September 3, 1927, which the respondent maintains was an amendment of the first claim. The Government admits that the respondent would be entitled to recovery on the grounds stated in the second claim, filed September 3, 1927, had it been filed in time, but inasmuch as the ground stated in that claim is

different from that stated in the former, it contends that the second claim can not be considered as an amendment of the first. The Court of Claims sustained the Government's contention on this point.

The question presented under this point is whether the second claim filed on September 3, 1927, can be regarded as an amendment of the first claim so that the second claim will relate back to the date of the first claim, February 28, 1923.

### STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 16–19.

### STATEMENT

On February 28, 1923, the respondent filed a claim for refund of income and excess profits taxes for the year 1917 in the sum of $844,695.54. (R. 13; Exhibit A, R. 8.) This claim asserted four different grounds, each one apparently having no relation to the items comprised in the others. One of the grounds was thus expressed: "Foreign-exchange adjustments and foreign dividends overstated." (R. 9.) On this point the contention made before the Commissioner was that a dividend received from the Compania Swift de Montevideo, a foreign corporation, should be treated as income for 1916 and prior years and should be taxed at 1916 rates instead of at 1917 rates. (R. 13.) The contention that any part of the amount taxed was not taxable because it was a stock dividend was not

suggested in the claim, and it was not made before the Commissioner under this claim. (R. 13, VIII.) This claim was rejected on April 24, 1926. (R. 13.)

On September 3, 1927, the respondent filed what it described as an amended claim for the refund of $498,961.29 of its income and excess-profits taxes paid for the year 1917, expressly based upon the contention that the dividend received from the Compania Swift de Montevideo was a stock dividend and not taxable. (R. 14; Exhibit B, R. 10.) This second claim stated, among other things: "Deponent paid the income and war excess-profits taxes assessed against it for the year 1917 on different dates. One such payment, $2,813,012.05, was made on September 6, 1923." This latter claim has not been acted upon by the Commissioner. (R. 17.) The Government contends that it was filed more than four years after the 1917 tax was paid.

The question which this contention raises is—at what point in the administrative procedure is a tax paid, when payment is made by means of the application of a credit for overpayment for another year. The facts bearing on this question follow.

On February 9, 1923, the Commissioner of Internal Revenue, in accordance with the procedure then in effect, signed and forwarded to the Collector of Internal Revenue a schedule of reductions of tax liability on Form 7777, in which was included an overassessment of income and profits

taxes of the respondent for the year 1918. (R. 16.)

The certificate of the Commissioner on Form 7777 directed the Collector to check the accounts of the taxpayers whose names appeared on the schedule, to determine whether or not their liabilities should be reduced by abatements and if so to make such abatements. (R. 14.) With reference to credits, he directed the Collector as follows (R. 14):

> If any part of the tax is found to be an overpayment, you will examine all accounts of the taxpayer for subsequent periods and apply such overpayment as a credit against the tax owing (if any) on the taxpayer's account for subsequent periods. (This applies to income, war-profits and excess-profits taxes only.)

He further directed the Collector as follows (R. 14):

> The balance (if any) of the overpayment shall be entered in column 12 and placed upon a schedule of refunds (Form 7777 A) and an appropriate memorandum made upon the taxpayer's account.

Before the Collector returned the schedule to the Commissioner, Form 7805–A, a Schedule of Refunds and Credits was adopted and was in use in place of the Schedule of Refunds, Form 7777–A. (R. 16, 17.)

On July 25, 1923, the Collector returned Form 7777 to the Commissioner with Form 7805–A, on which he reported that after abating a portion of the overassessment for 1918 he had applied another portion as a credit against an additional assessment for 1917 and that the balance remaining was refundable. (R. 16.)

On September 6, 1923, the Commissioner signed the authorization to the disbursing clerk on Form 7805–A, authorizing the disbursing clerk to pay the amounts shown on such schedule to be refundable together with accrued interest, if any. (R. 15, 16.)

Certificates of overassessment addressed to the taxpayers were forwarded to the Collector at or about the same time that schedules of reduction of tax liability (i. e., the schedules of overassessment) were forwarded to him, but they were not mailed to the taxpayers until after the Commissioner signed the authorization to the disbursing clerk on Form 7805-A. The certificate of overassessment, sent to the respondent on September 26, 1923, was the only communication sent to it notifying it of the allowance of the credit. (R. 15, 16.)

The Court of Claims held that the second claim was based on a ground not suggested by the first claim and therefore was not an amendment of the first claim, but that the 1917 taxes were not paid by credit until the Commissioner signed the authorization to the disbursing clerk to pay the amounts

which appeared to be refundable on the schedule of refunds, and therefore that the second claim was filed in time, i. e., within four years "from the time the tax was paid" as required by Section 284 (b) (1) of the Revenue Act of 1926 (pp. 16–17, *infra.*)

## SPECIFICATION OF ERROR

The Court of Claims erred in holding that the claim for refund of the 1917 taxes involved in this suit was filed within four years after the payment of the 1917 taxes was made through the allowance of a credit against them for an overpayment of 1918 taxes.

## SUMMARY OF ARGUMENT

The 1917 tax was paid by credit on or before July 25, 1923, when the Collector certified to the Commissioner that he had applied an overpayment for 1918 as a credit against the 1917 assessment. The tax was paid when, by entering the credit on his records, the Collector extinguished the tax indebtedness of the respondent. The claim for refund dated September 3, 1927, was filed more than four years after the payment of the tax and no recovery can be had under it.

The court below was correct in holding that this claim can not be regarded as an amendment of the first claim for refund so as to date back to the date of that first claim—February 28, 1923.

## ARGUMENT

### I

THE 1917 TAX WAS PAID BY CREDIT MORE THAN FOUR YEARS PRIOR TO THE FILING OF THE CLAIM FOR REFUND DATED SEPTEMBER 3, 1927, AND NO RECOVERY CAN BE HAD UNDER THAT CLAIM

Section 284 of the Revenue Act of 1926, *infra*, pp. 16–17, provides that "where there has been an overpayment * * * the amount of such overpayment shall * * * be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, * * *" and that "No * * * refund shall be allowed * * * after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed * * *."

The 1917 tax was paid by credit.[1] The respondent contends that it was not paid until the Commissioner on September 6, 1923, signed the order to the disbursing clerk to pay the amounts shown to be refundable on the schedule of refunds to those taxpayers named on the schedule. It contends that this was both the date of the allowance of the credit and the date of payment by the credit.

The Government contends that payment by credit took place when the taxpayer's liability for the

[1] The credit was not void under Section 609 of the Revenue Act of 1928, *infra*, p. 18, for it does not appear in the record that, prior to the application of the overpayment as a credit, payment of the 1917 tax or refund of the 1918 overpayment was barred by the statute of limitations.

1917 tax was extinguished. This indebtedness was shown on the records of the Collector. The taxpayer could have discharged the obligation by payment of the tax in cash at the Collector's office. Instead of paying cash, it was relieved of the tax liability by having an overpayment of tax for 1918 set off against its 1917 tax obligation. This was accomplished by the Collector making the appropriate entries in his records. When this had been done, the Collector certified to the Commissioner, on July 25, 1923, that the amounts had been entered as credits against the respondent's 1917 and other assessments. The tax liability then was as completely discharged as if the respondent had paid cash.

The subsequent signing of the schedule of refunds and credits was not in any sense a payment, for the tax had already been paid by application of the credit. In the Government's brief in the *Boston Buick Co.* and *Iron Cap Copper Co.* cases, Nos. 42 and 43, October Term, 1930, the character of this subsidiary schedule is discussed and it is argued at length that it must be signed *after* the credit has been allowed. That argument is equally applicable to this case.

There are no other cases which decide this identical question. But the date of payment of a tax by credit has been the subject of judicial opinion. That the tax was paid when the Collector entered the credit on his records is the only view in accord

with the language of two court decisions holding that, where collection of a tax is barred by the running of the statute of limitations, application of a credit to discharge the tax obligation is barred also. In these cases the question was as to the date of collection; in the instant case it is as to the date of payment. But the same act is collection and payment. In *Peerless Paper Box Mfg. Co.* v. *Routzahn*, 22 F. (2d) 459 (N. D. Ohio), the court concluded:

> My opinion is that the statute had run against the collection of the second additional assessment for 1917, and that the action of the collector in October, 1924, crediting the refund for 1918 against the second additional assessment for 1917 was tantamount to the method of tax collection held by the Supreme Court to be prohibited after the expiration of the time limited by statute.

Equally pertinent is the following language of the court in *Brady* v. *United States*, 24 F. (2d) 205 (D. Mass.):

> In the Brady case a refund owed to a taxpayer was not paid to him, but was credited against an uncollected tax outlawed by the statute of limitations then in force. * * *
>
> * * * * *
>
> The Brady tax was "collected" by the bookkeeping entry just as illegally as if there had been a suit or a process of distraint. * * *

The Court of Claims itself said in its opinion (rendered after that in the instant case) in *Boston Pressed Metal Company* v. *United States*, 42 F. (2d) 312, now before this Court on another point as No. 337, October Term, 1930:

> When the collector applied part of the money, which was due on the refund, to another tax, the relation of plaintiff and defendant to the transaction so far as this question is concerned was in law the same as if the collector had received cash from the plaintiff; * * *.

In the instant case we submit that the entries were made and the tax paid on or before July 25, 1923, and that the claim for refund of September 3, 1927, was not filed within four years from the time the tax was paid, as required by Section 284 (b) (1) of the Revenue Act of 1926, pp. 16–17, *infra*).

## II

THE 1923 CLAIM FOR REFUND CAN NOT SUPPORT THIS SUIT, NOR WAS THE 1927 CLAIM AN AMENDMENT OF THE EARLIER ONE SO AS TO DATE BACK TO THE DATE OF THAT FIRST CLAIM

Section 3226 of the Revised Statutes, reenacted in Section 1113 of the Revenue Act of 1926 (*infra*, p. 17), provides that "no suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax * * * until a claim for refund or credit has been duly filed * * * according to the provisions of law in that regard, and

the regulations of the Secretary of the Treasury * * *." Regulations 62, in force when the first claim for refund was filed, provided in Article 1036 (*infra*, pp. 18–19), that "all the facts relied upon in support of the claim should be clearly set forth."

In *Tucker* v. *Alexander*, 15 F. (2d) 356, the Circuit Court of Appeals for the Eighth Circuit said (p. 357):

> The evident purposes and objects of this condition [filing of claim] are to afford the Commissioner an opportunity to correct errors made by his office and to spare the parties and the courts the burden of litigation in respect thereto. Unless the claimant were required to present to the Commissioner all of the grounds upon which he relies for refund, the above purposes and objects would be partially or entirely defeated.

The reversal of this decision by this Court, 275 U. S. 228, was upon another ground and does not affect this portion of the opinion.

The first claim did not specify the contention made in the "amended" claim, and that contention was not made before the Commissioner under the first claim. (See pp. 3–4, *supra*.) The claim was signed February 28, 1923, nearly three years after the decision of this Court on March 8, 1920, in *Eisner* v. *Macomber*, 252 U. S. 189, that stock dividends are not taxable as income. The respondent had every opportunity to raise this ground, but neglected to do so. We contend that the first claim

can not support the present suit for it gave the Government officials no indication that a refund would be sought on the ground that a stock dividend was erroneously taxed. *Red Wing Malting Company* v. *Willcuts,* 15 F. (2d) 626, 634 (C. C. A. 8th), certiorari denied 273 U. S. 763. See *Tucker* v. *Alexander,* 275 U. S. 228, 231, *supra.*

But the respondent contends that the real ground for refund was set out in the second claim for refund and that the second claim should be treated as an amendment of the first claim, and hence that the situation is the same as if the real ground for refund had been called to the attention of the Government officials in February, 1923. This second claim set up an entirely new basis for refund. The situation is similar to that presented by an amended declaration which seeks to introduce a new cause of action or to bring in new parties defendant. In contemplation of the statute of limitations, such an amendment does not date back to the original declaration, but is equivalent to a new declaration. *Miller* v. *McIntyre,* 6 Pet. 61; *Sicard* v. *Davis,* 6 Pet. 124. See also *Seaboard Air Line Railway* v. *Renn,* 241 U. S. 290.

That the second claim is not an amendment of the first is further shown by the fact that the claim states that the money, of which the respondent seeks refund, was paid on September 6, 1923 (R. 11), which was after the date of the original claim. A claim for refund can relate only to taxes paid prior

to the date of the claim. *Rock Island Railroad Co.* v. *United States*, 254 U. S. 141. The following language of this Court in *Kings County Savings Institution* v. *Blair*, 116 U. S. 200, 205, is applicable:

> We think there is no ground for this contention to rest on. No claim for the refunding of taxes can be made according to law and the regulations until after the taxes have been paid. It is not pretended that since the payment of the tax by the plaintiff any one of the steps required by the law and regulations to make an effectual claim for the refunding of the tax has been taken. All the safeguards prescribed by the Secretary of the Treasury for the protection of the public interests, in his regulations respecting claims for the refunding of taxes, have been disregarded. There has been no claim whatever in the sense of the law.

The only claim setting out a valid ground for refund of the taxes now sought to be recovered was filed on September 3, 1927. This, we submit, was more than four years after payment of the taxes, and is therefore ineffective as a basis for this suit.

## CONCLUSION

The decision of the court below was erroneous, and its judgment should be reversed.

Respectfully submitted.

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DECEMBER, 1930.

# APPENDIX

## STATUTES AND REGULATIONS INVOLVED

The Revenue Act of 1926, c. 27, 44 Stat. 9, 66, 116, provides in part:

> SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.
>
> (b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—
>
> (1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a

claim therefor is filed by the taxpayer; and * * * (U. S. C. App. Title 26, Sec. 1065.)

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924. (U. S. C. Title 26, Sec. 156; U. S. C. App. Title 26, Sec. 156.)

The Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875, provides in part as follows:

> SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.
>
> Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U. S. C. Sup. III, Title 26, Sec. 2607.)
>
> SEC. 609. ERRONEOUS CREDITS.
>
> (a) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.
>
> (b) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608.
>
> (c) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act. (U. S. C. Sup. III, Sec. 2609.)

Article 1036 of Treasury Regulations 62, promulgated February 15, 1922, under the Revenue Act of 1921, provides:

> CLAIMS FOR REFUND OF TAXES ERRONEOUSLY COLLECTED.—Claims by the taxpayer for the refunding of taxes and penal-

ties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. In the case of the taxpayer's death, certified copies of the letters of administration or letters testamentary, or other similar evidence, must be annexed to the claim to show the authority of the administrator or executor. The affidavit may be made by an agent of the person assessed, but in such a case a power of attorney must accompany the claim. Checks in payment of claims allowed will be drawn in the names of the persons entitled to the money and shall, unless otherwise directed, be sent directly to the proper persons. The Commissioner has no authority to refund on equitable grounds penalties legally collected. As to claims for refund of sums recovered by suit see article 1051.

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

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**No. ~~700~~ 56**

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THE UNITED STATES, PETITIONER,

*v.*

SWIFT AND COMPANY, RESPONDENT.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.*

---

## BRIEF FOR RESPONDENT IN OPPOSITION.

---

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

---

## No. 700

---

THE UNITED STATES, PETITIONER,

*v.*

SWIFT AND COMPANY, RESPONDENT.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.*

---

## BRIEF FOR RESPONDENT IN OPPOSITION.

---

### The Question.

The question which the Government seeks to have reviewed is, Where a taxpayer has overpaid his tax for one year and the overpayment is credited in whole or in part on taxes due for other years, when is the credit *allowed* so as to become effective as a payment?

The question arises in determining when the four-year period within which to file a claim for refund

begins to run, where, as in this case, the tax was paid by the allowance of a credit.

The same question is involved in *United States* v. *Boston Buick Co.* and *United States* v. *Iron Cap Copper Co.*, 35 Fed. (2d) 560, C. C. A. 1st, in which, also, the Government is applying for writs of certiorari, Nos. 632 and 633. There the question arises in determining the date to which to compute interest on credits.

The lower courts all held that the question was settled by this Court in *Girard Trust Co.* v. *United States*, 270 U. S. 163, 70 L. ed. 524.

## Statement of the Case.

The respondent obtained a judgment in the Court of Claims for an overpayment of income and excess-profits taxes for 1917 caused by including a stock dividend in its return before it had been decided that such dividends are not income.

The Government admits the overpayment. The point in dispute is whether recovery of it is barred for failure to file a sufficient claim for refund within the period prescribed by law, i. e., within five years from the date when the return was due, Revenue Act of 1921, § 252, or within four years from the time the tax was paid, Revenue Act of 1926, § 284 (b) (1).

Two claims for refund were filed, one February 28, 1923, and another September 3, 1927. (Pet., Exs. A, B, Rec., 8-11.) The Court of Claims, believing that the first did not adequately state the ground of claim, based its judgment on the second, which, concededly, was not open to that objection.

The last payment of 1917 taxes assessed against the respondent was made by allowing an overpayment of 1918 taxes as a credit under § 252 of the Revenue Act of 1921. Therefore, whether the second claim was filed within the four-year period depends upon when this credit was allowed or took effect as a payment.

Under date of February 9, 1923, the Commissioner, in accordance with the established procedure, signed and forwarded to the Collector of Internal Revenue for the First District of Illinois a Schedule of Reductions of Tax Liability (Form 7777), later called Schedule of Overassessments, in which was included an overassessment of income and excess-profits taxes for 1918 against the respondent in the amount of $10,304,753.94, and at the same time forwarded to the Collector undated Certificates of Overassessments addressed to the respective taxpayers named in the schedule and showing the amount of the overassessment against each. On July 25, 1923, the Collector returned this Schedule to the Commissioner with a report entered thereon, and also with a Schedule of Refunds and Credits (Form 7805A), both showing what portions of the overassessments if any were overpayments, and how the overpayments should be distributed as between credits and refunds. With respect to the overassessment of $10,304,753.94 which had been made against the respondent, the Collector's report showed an overpayment of $4,953,575.50 (the balance of the overassessment having been abated); that out of this overpayment certain amounts were "subject to credit" against taxes due for other periods, including an item of $2,813,012.05, the amount of an additional assessment of income and excess-profits taxes for 1917,

which is the credit here in question; and that the balance, $735,028.10, was refundable. At the same time that these schedules were forwarded by the Collector to the Commissioner the Collector returned to the Commissioner the Certificates of Overassessments in the cases of the taxpayers named in the Schedule of Refunds and Credits, including the respondent. Thereafter, under date of September 6, 1923, the Schedule of Refunds and Credits was signed by the Commissioner, the Deputy Commissioner having first signed it; and under date of September 26, 1923, the Certificate of Overassessment addressed to the respondent, showing the amount of the overassessment, and the portion thereof abated, the portion allowed as a credit, and the portion allowed as a refund, was mailed to the respondent and duly received. (Special Findings of Fact, XI, XII, Rec., 14-16.)

**The Respective Contentions.**

Ignoring the settled distinction between the determination of an overassessment and the allowance of a credit or refund, the Government maintains that a credit is allowed when the Commissioner of Internal Revenue signs and transmits to the proper Collector of Internal Revenue a Schedule of Overassessments—February 9, 1923, in the present case.

The respondent maintains on the other hand that under the law as construed by this Court in *Girard Trust Co.* v. *United States*, 270 U. S. 163, 70 L. ed. 524, neither a credit nor a refund is allowed until the Commissioner, after transmitting the Schedule of Overassessments, receives back the Collector's report showing what part of the over*assessment* listed in the Schedule of Overassessments was an over*payment* and

how much should be credited against taxes for other years and how much refunded, and "makes it effective by his approval"—September 6, 1923, in the present case.

As the Collector keeps the accounts, until his report is received the Commissioner does not even know whether there has been any over*payment* out of which to allow a credit, or, if there has been an overpayment, whether there are any unpaid assessments against which to credit it, so that the Government's contention, if adopted, would put the Commissioner in the impossible position of allowing a credit not only when he does not know what amount to allow, but when the Collector's report in some cases would show no overpayment at all and therefore nothing to credit and in others no unpaid assessments against which to credit any overpayment if there were one.

The Government's contention has been rejected by the lower courts in four cases, not a judge dissenting, as contrary to the decision of this Court in the *Girard Trust Company Case*—by the Court of Claims in the present case, and by the Circuit Court of Appeals, First Circuit, in *United States* v. *Boston Buick Co.* and *United States* v. *Iron Cap Copper Co.*, *ante*, affirming two decisions of the District Court for Massachusetts, one by Brewster, J., 27 Fed. (2d) 395, and one by Morton, J., 31 Fed. (2d) 628.

In no case in which the question was contested has any different view been expressed. While the Government's brief[1] states, "There is some conflict in the decisions of the lower Federal courts" (p. 9), the only

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[1]References herein to the Government's brief are to its brief in Nos. 632 and 633, no separate brief having been filed by it in the present case.

case cited in support of that statement is *Penn Smokeless Coal Co.* v. *United States*, 34 Fed. (2d) 205, in the District Court for Western Pennsylvania. But the point was not in controversy there, the Government's brief in that case stating: "Counsel for the plaintiff and for the Government are agreed that a credit is allowed when the Commissioner approves the Schedule of Overassessments for transmission to the proper accounting officer for credit." (*Penn Smokeless Coal Co.* v. *United States*, U. S. Dist. Ct. W. Dist. Pa. No. 5668 L., Deft's Reply Brief, p. 3a.)

Furthermore, as shown in the opinion of the Court of Claims in the present case (Rec., 19), and that of the Circuit Court of Appeals in the *Boston Buick Company* and *Iron Cap Copper Company Cases*, 35 Fed. (2d) 563, what the Pennsylvania court supposed was "the rule laid down in *Girard Trust Co.* v. *United States*," and upon which it expressly based its conclusion that a credit is allowed when the Schedule of Overassessments is signed, was the text of a Treasury regulation which this Court had quoted only to reject as an erroneous interpretation of the statute!

The respondent maintains further that regardless of whether the claim filed September 3, 1927, was in time, the original claim for refund filed February 28, 1923, admittedly within the prescribed period, was sufficient, or could be made sufficient by amendment as well after the expiration of the period of limitations as before.

## The Argument.

### Point I.

**The credit by means of which respondent made the last payment of 1917 taxes was allowed September 6, 1923, when the Commissioner of Internal Revenue approved the Collector's report showing the amounts of the 1918 overassessment subject to credit and refund, respectively, so that the claim for refund filed September 6, 1923, fell within four years from the date of payment of the tax.**

1. THIS COURT DECIDED IN GIRARD TRUST CO. v. UNITED STATES, 270 U. S. 163, THAT A CREDIT IS NOT ALLOWED UNTIL THE COMMISSIONER, AFTER TRANSMITTING TO THE COLLECTOR THE SCHEDULE OF OVERASSESSMENTS, RECEIVES BACK AND APPROVES THE COLLECTOR'S REPORT SHOWING WHAT PART OF THE OVERASSESMENT WAS AN OVERPAYMENT AND IF ANY HOW MUCH SHOULD BE CREDITED AND HOW MUCH REFUNDED.

The *Girard Trust Company Case* involved the meaning of the words "to the date of such allowance" in § 1324 (a) of the Revenue Act of 1921 providing that "upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be * * * paid * * * to the date of such allowance."

The Court first stated the general rule for determining what constitutes an allowance of a claim for credit or refund:

> "The Commissioner of Internal Revenue is the final judge in the administrative branch of

> the Government to decide that an overassessment has been made and that a refund or credit should be granted, and when he has made that decision *finally*, he has allowed the claim for the refund or credit of the taxes paid within the meaning of the section." (270 U. S. 170, 70 L. ed. 528.) [Italics ours.]

It then rejected the Government's contention that a credit or refund was allowed under the Revenue Act of 1921 when the Commissioner decided that there had been an overassessment and signed and forwarded to the Collector a Schedule of Overassessments, with instructions to examine his books and report back the amounts, if any, that should be credited or refunded. On this point the opinion states:

> "We cannot concur, however, in the view of the Treasury Department that the date of the allowance of the claim as intended by the statute is the date when the Commissioner first decides that there has been an overassessment and sends upon a proper form his decision to the collector of internal revenue, who made the collection and keeps the account with the taxpayer." (270 U. S. 170-171, 70 L. ed. 529.)

If nobody but the Commissioner has authority to allow a claim for credit or refund, and if his decision that there has been an overassessment and his signing of the Schedule of Overassessments and forwarding it to the Collector for a report as to the amounts that should be credited or refunded does not constitute an allowance of the claim, of necessity there can be no allowance until some further act by the Commissioner. The opinion states what that is:

> "The findings and exhibits show that the course of business is that the collector on receiving from the Commissioner the schedule as to the overassessment, examines his books and reports back to the bureau the amount which should be credited on taxes due and the amount to be refunded, that this is examined by the assistant commissioner and then is delivered to the Commissioner, who makes it effective by his approval. Until it reaches him and is approved by him, the refund cannot be paid. This we think is the real date of allowance. Until that time the exact amount of the refund is not fixed finally by competent authority." (270 U. S. 171, 70 L. ed. 529.)

While only refunds were directly involved in the *Girard Trust Company Case*, the Court, as the quoted passages show, expressly put credits on the same footing as refunds for the purpose of determining the date of allowance, and laid down the same rule for both, namely, that the Commissioner "has allowed the claim for the refund *or credit*," not when he "first decides that there has been an overassessment and sends upon a proper form his decision to the collector of internal revenue," but only after the collector "examines his books and reports back to the Bureau the amount which should be *credited* on taxes due and the amount to be refunded," and the Commissioner "by his approval" makes that report "effective."

These statements cannot be dismissed as *dicta* because even though the Court had not in express terms put claims for credit on the same footing as claims for refund as regards what constitutes allowance, that would have followed as a necessary consequence from the ground of the decision.

The ground of the decision was that a claim for refund is not allowed until the amount is fixed finally by competent authority, namely, the Commissioner of Internal Revenue:

> "This we think [the Commissioner's approval of the Collector's report] is the real date of allowance. Until that time the exact *amount* of the refund is not fixed finally by competent authority." (270 U. S. 171, 70 L. ed. 529.) [Italics ours.]

As the allowance of a claim for refund and the allowance of a claim for credit are acts of exactly the same nature and effect—*adjudications* by the Commissioner of Internal Revenue against the United States for taxes overpaid (*United States* v. *Kaufman*, 96 U. S. 567, 570-571, 24 L. ed. 792, 793)—if a claim for refund is not allowed until the amount is fixed finally by the Commissioner, the same must be true of a claim for credit.

The reason in both cases is that a claim against the United States for money or money's worth is not finally allowed until the amount has been determined *by the officer or tribunal authorized by law to make the determination*,[1] any more than a judgment of a court

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[1] Compare *Illinois Surety Co.* v. *United States*, 240 U. S. 214, 60 L. ed. 609, construing the words "final settlement" in the Act of August 13, 1894, as amended February 24, 1905 (33 Stat. 811), authorizing subcontractors to bring suit on the contractor's bond "if no suit should be brought by the United States within six months from the completion and final settlement of said contract." The Court said: "The word 'settlement', in connection with the public transactions and

for the recovery of money or money's worth is final until the amount has been determined *by the court*.[1]

The reason operates with even greater force in the case of claims for credit or refund of illegally collected taxes than in the case of ordinary claims, because, as

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accounts, has been used from the beginning to describe administrative determination of the amount due. * * * We think that the words 'final settlement' in the act of 1905 had reference to the time of this determination when, so far as the Government was concerned, the amount which it was finally bound to pay or entitled to receive was fixed administratively by the proper authority." (240 U. S. 219-221, 60 L. ed. 614.)

Compare also *United States v. Clark*, 94 U. S. 73, 75-76, 24 L. ed. 67, 68; 96 U. S. 37, 38, 24 L. ed. 696, 697; *United States v. Louisana*, 123 U. S. 32, 37, 31 L. ed. 69, 72.

[1] Thus, in *Guarantee Co. v. Mechanics Bank & Trust Co.*, 173 U. S. 582, 43 L. ed. 818, the Bank brought suit against the Guarantee Company to recover an amount alleged to be due under two bonds insuring the Bank against loss on account of the fraudulent acts of one of its officers, Schardt, by name. The Guarantee Company denied liability. The lower court adjudged that it *was* liable to the extent of the penalty of each bond, with interest, less the amount of "collections realized on assets or collaterals turned over to the Bank by Schardt to reimburse it," and a Master was appointed to ascertain and report the amount of such collections. It was held this was *not* a final decision, because—"Notwithstanding the company's defenses were adjudged to be bad in law, it remained for the circuit court by proper orders to accomplish the object of the suit, namely, *to ascertain the amount* for which the plaintiff was entitled to judgment and execution." (173 U. S. 586, 43 L. ed. 820.) [Italics ours.]

shown later (*post*, 23-25), the very provision of law which authorizes the Commissioner to allow credits and refunds of illegally collected taxes expressly contemplates that the amount due the taxpayer shall be ascertained before the allowance is made, and because further in such cases the action of the Commissioner "is not the allowance of an ordinary claim against the Government, by an ordinary accounting officer, but the *adjudication* by the first tribunal to which the matter must by law be submitted." (*United States* v. *Kaufman*, 96 U. S. 567, 570-571, 24 L. ed. 792, 793.) [Italics ours.]

The *Girard Trust Company Case* establishes another point with respect to when a credit is allowed. Where, as in that case, part of the overpayment is applicable as a credit against other taxes and part is refundable, the amount of the refund, being simply the balance of the overpayment remaining after the amount of the credit has been determined by the Commissioner,[1] becomes fixed the instant that determination is made.

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[1] Section 252 of the Revenue Act of 1918 provided: "That if, upon examination of any return of income * * * it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installments thereof, then due from the taxpayer under any other return, and any *balance of such excess shall* be immediately refunded to the taxpayer * * *." [Italics ours.] This provision was reenacted without material change in the Revenue Act of 1921, § 252, in the Revenue Act of 1924, § 281, the Revenue Act of 1926, § 284, and the Revenue Act of 1928, § 322.

If, then, the amount of the refund in the *Girard Trust Company Case* was not fixed finally by competent authority until the Commissioner approved the report of the Collector it must have been because until that time the amount of the credit had not been fixed finally by competent authority. Therefore, in deciding when the amount of the refund in that case was fixed finally by competent authority the Court necessarily decided also that the amount of the credit was fixed finally by competent authority at the same time. And the Circuit Court of Appeals in the *Boston Buick Company* and *Iron Cap Copper Company Cases* so held, saying:

> "While it is true that the issue involved in the Girard Trust Company Case related only to the date of the allowance of a refund, the court, though by way of *dictum*, as it may be argued, also as definitely fixed the time of the allowance of credits. Its *dictum* as to the time of allowance of credits was, we think, an inevitable conclusion from its finding as to the time of allowance of a refund; since the amount to be refunded is absolutely determined when the credits are allowed." (35 Fed., 2d, 562.)

Thus, the *Girard Trust Company Case* is not only conclusive of the proposition that a claim for credit, like a claim for refund, is not allowed until the amount is fixed finally by the Commissioner, but also of the proposition that where, as in the present case, part of the overpayment is applicable as a credit and part is refundable the allowance of the credit and the allowance of the refund necessarily take place at the same time because the respective amounts are fixed finally at the same time.

Moreover, the Government presented the case on the theory that there is no difference between a claim for refund and a claim for credit from the standpoint of what constitutes allowance. Thus, contending for the date of the Commissioner's approval of the original schedule as the date of allowance, the Solicitor General's brief stated:

> "The right to refund *or credit* and the amount thereof was thus fixed and determined. * * * Thereafter it was only a routine matter to determine how much the claimant should receive in cash and how much by way of credit. This, of course, takes time if the interests of the Government are to be fully protected. Whichever it may be, the total of principal and interest received by the claimant is the same, and the date of the allowance of the claim, that is, the date of adjudication of his right to *credit* or refund, remains the date of the approval of the original schedule." (Sup. Ct., Oct. Term 1925, No. 137, *Girard Trust Co.* v. *United States*, Brief for United States, pp. 13-14.) [Italics ours.]

And after the case was decided, fixing a later date as the date of allowance, namely, the date of the Commissioner's approval of the Schedule of Refunds and Credits, the Treasury Department at first treated the decision as applicable to claims for refund and claims for credit alike (Govt. Br., 26; T. D. 3850, head-note 1, Cum. Bul. V-1, p. 354, reproduced below [1]), just as it

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[1] "Under Sections 250 (b), 252, and 1324 (a) of the Revenue Act of 1921, the *date of allowance* to which interest is payable on *credits* and refunds is the date of final approval by the Commissioner and not the date

had formerly treated the date on which the Commissioner signed the Schedule of Overassessments as the date of allowance of claims for refund and claims for credit alike.[1]

Again, in *Blair, Comr.* v. *United States ex rel. Birkenstock*, 6 Fed. (2d) 679, affirmed by this Court, 271 U. S. 348, 350, 70 L. ed. 983, 984, on the authority of the *Girard Trust Company Case*, the brief for the Government, replying to a contention by the taxpayer that there might be a difference between credits and refunds as regards the date of allowance, observed:

> "Under the contention of counsel for the petitioners the schedule sent to the Collector is an allowance in the case of a credit, but is not an allowance in the case of a refund. A single word in an Act cannot have one meaning when applied to one set of facts and another meaning when applied to another set of facts; *the word 'allowance' cannot refer to one action of the Commissioner when applied to a credit and to another action when applied to a refund.*" (Ct. App. D. C., Jan. Term 1925, No. 4246, Brief for Appellant p. 23.) [Italics ours.]

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when the Commissioner first determines that an overassessment should be made and transmits the schedule to the collector and not the date of final payment." [Italics ours.]

[1] Thus, Regulations 62, Art. 1040, provided: "A claim for refund *or credit* is allowed within the meaning of the statute when the Commissioner approves the schedule in whole or in part, for transmission to the proper accounting officer, for *credit* or refund." [Italics ours.] Regulations 65, Art. 1371, contained the same provision.

These passages from the Government's briefs in prior cases are quoted not, of course, to show inconsistencies in argument, but to show that it was the understanding of law officers and Treasury officers alike that claims for credit and claims for refund stand on the same footing as regards what constitutes allowance.

The Government now states its position with respect to the bearing of the *Girard Trust Company Case* on when a credit is allowed as follows:

> "In view of these facts, we submit that the *Girard Trust Company case* should not be considered as having decided the question as to when a credit is allowed. We recognize, however, that that case established two principles which are equally applicable to the allowance of a credit, namely: (1) that the allowance of a refund occurs when there is a decision by competent authority that a refund should be made, and (2) that a statute providing for the computation of interest should be construed in the light of the difficulties of government bookkeeping and accounting." (Govt. Br., 19-20.)

The Government thus concedes that the principle laid down in the *Girard Trust Company Case* for determining when a refund is allowed is equally applicable to credits.

This seems to us to concede everything we are contending for, as the principle laid down in the *Girard Trust Company Case* for determining when a refund is allowed is, as just seen (*ante*, 8, 10), that it is when the Commissioner has made his decision *finally*, and that he makes his decision finally, not when he signs and transmits to the Collector the Schedule of Overassessments,

because at that time he does not even know that there has been any overpayment out of which to allow a refund, but when he fixes the amount of the refund by his approval of the Collector's report.

Applying this principle to the allowance of credits, the Commissioner makes his decision *finally*, not when he signs and transmits to the Collector the Schedule of Overassessments, because at that time he does not even know that there has been any overpayment out of which to allow a credit, but when he fixes the amount of the credit by his approval of the Collector's report.

2. THE CONTENTION THAT A CREDIT IS ALLOWED WHEN THE COMMISSIONER SIGNS THE SCHEDULE OF OVERASSESSMENTS.

**a. A determination that there has been an overassessment is not an allowance of a credit or refund.**

The fundamental error in the Government's position here, as it was in the *Girard Trust Company Case*, is its failure to distinguish between a determination of an overassessment and an allowance of a credit or refund.

The provision of the Schedule of Reductions of Tax Liability (later called Schedule of Overassessments) the signing of which by the Commissioner is alleged to have constituted an allowance of a *credit* in this case is the same provision the signing of which by the Commissioner was alleged to have constituted an allowance of a *refund* in the *Girard Trust Company Case*, and is set forth in the Special Findings of Fact, par. XI, (Rec., 14-15.)

It does not even purport to be an allowance by the Commissioner of either a credit or a refund. It is, as

it says, an allowance of a "reduction of tax liability," a determination of an overassessment.

This distinction goes to the root of the matter. Deciding that there has been an overassessment is only the first step in the allowance of a credit or refund. The opinion in the *Girard Trust Company Case* expressly states that the proceedings leading up to the allowance of a credit as well as of a refund only "began" with that action. (270 U. S. 164-165, 70 L. ed. 526.) Before the Commissioner can allow a credit or refund, it still has to be determined, *first*, what part of the *overassessment*, if any, was paid and what part abated; *second*, what unpaid assessments there are against the taxpayer for other years; and *third*, whether such unpaid assessments, if any, are legally collectible in whole or in part.

At the time of signing and forwarding to the Collector the Schedule of Overassessments the Commissioner did not know, as the text of his authorization to the Collector shows (Special Findings of Fact, XI, Rec., 14-15), whether or not there had been any overpayment out of which to allow a credit or refund, nor, if there had been an overpayment, whether there were any unpaid assessments for other years to be set off, if legally collectible; and he did not get that information until the Collector returned the Schedule of Overassessments together with a report showing the state of the taxpayer's account.

That the Commissioner had to have this information before he could allow a credit was recognized by the Treasury Department itself from the beginning. Thus the findings of fact in the *Iron Cap Copper Company Case*, No. 633, show:

> "In the early practice, before the Commissioner could prepare a schedule of credits[1] * * *, he had to have information from the Collector's office as to what taxes were due and how much the taxpayer had paid. Before the Commissioner issued a Schedule of Credits, the Commissioner had to know how much the taxpayer had overpaid on the year in question. An overpayment would not be allowed to be credited without evidence of the actual overpayment." (Rec., 38.)

Not only, therefore, was a credit not allowed when the Commissioner signed and forwarded to the Collector the Schedule of Overassessments, but it was impossible for the Commissioner to have made the allowance at that time. To hold that he did would put him in the position of allowing a credit—of *adjudicating* that the United States is indebted to the taxpayer (*United States* v. *Kaufman*, 96 U. S. 567, 570-571, 24 L. ed. 792, 793)—not only when he did not know how much to allow but when in many cases the Collector's report would show that the United States owed the taxpayer nothing.

The distinction between the determination of an overassessment and the allowance of a credit or refund was the foundation of the decision in the *Girard Trust Company Case*.

It was also the basis of the decision of the Court of Claims in the present case:

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[1]Regulations 45, Article 1035, provided "that a schedule of credit claims on Form 7220A will be transmitted to the Collector once a month and formal credit shall be taken by the Collector at that time."

> "The commissioner's decision that there has been an overassessment is one thing; the determination that there has been an overpayment is quite another. This cannot be determined by the commissioner until he is informed by the collector what part, if any, of the overassessment had been paid, and what part, if any, had been abated." (Rec., 20-21.)

That the determination of an overassessment, or even an overpayment (which is a step farther along), does not carry with it the allowance of a credit or refund, but that the latter is a separate and distinct act, has likewise been decided by the Board of Tax Appeals. The statute gives the Board jurisdiction in certain cases to determine whether a taxpayer has made an overpayment, and the question arose whether that carried with it jurisdiction to allow a credit or refund in those cases. The Board held not, saying:

> "*It would seem unnecessary to point out the distinction between a determination that the taxpayer has made an overpayment of tax and a determination that the taxpayer is entitled to a credit or to a refund.* The statute grants the Board jurisdiction to determine that the taxpayer has made an overpayment of tax in respect of the taxable year for which the Commissioner determined the deficiency, and then, so far as jurisdiction of the Board is concerned, becomes silent. The remainder of the provision is administrative, directing as it does that such overpayment shall be credited or refunded under certain circumstances. It gives the Board no jurisdiction to determine whether such circumstances exist." (Appeal of *Dickerman & Englis, Inc.*, 5 B. T. A. 633, 635.) [Italics ours.]

The Government relies especially upon the clauses in the Schedule of Overassessments directing the Collector to ascertain whether any part of the overassessment was an overpayment, and if so, to apply the overpayment as a credit on any taxes due for other periods and enter the balance as refundable, pointing to this as a "positive order to make the credit and reduce the tax liability." (Br., 21-22.)[1]

This would be delegating to the *Collector* authority to allow a credit, which, as the Government itself rightfully says (Br., 20), cannot be done.[2]

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[1]The statement in the Government's brief (pp. 8, 22) that, "To hold that this authorization by the Commissioner does not constitute an allowance of a credit is to hold that a taxpayer's tax liability may be discharged, without the credit having been allowed by any authority," is a plain *non sequitur*. The liability cannot be discharged until the tax is paid, and in the case of payment by giving credit for a prior overpayment, the payment is not consummated, and therefore the liability is not discharged, until the credit is allowed in the manner provided by law.

[2]Authority to allow credits or refunds of illegally collected taxes is judicial in its nature. (*United States* v. *Kaufman*, 96 U. S. 567, 570, 24 L. ed. 792, 793; *United States* v. *Real Estate Savings Bank*, 104 U. S. 728, 734, 26 L. ed. 908, 909; *United States* v. *Louisville*, 169 U. S. 249, 253, 42 L. ed. 735, 737.) Authority of that kind cannot be delegated by the officer in whom the statute has vested it. (*Martin* v. *Mott*, 12 Wh. 19, 31-32, 6 L. ed. 537, 541; *The Floyd Acceptances*, 7 Wall. 666, 676-677, 19 L. ed. 169, 173-174; *Runkle* v. *United States*, 122 U. S. 543, 557, 30 L. ed. 1167, 1171; *In re Giles*, 21 Fed., 2d, 536, 537; *Birdsall* v. *Clark*, 73 N. Y. 73, 29 Amer. Rep. 105, 106; *Lewis* v. *Lewis*, 9 Mo. 183,

Be that as it may, these directions were considered in the *Girard Trust Company Case*. If effective as an allowance of a claim for credit they would be equally effective as an allowance of a claim for refund. This Court, however, as we have seen, treated the entries made by the Collector pursuant thereto not as entries of credits or refunds which had been finally allowed, but as provisional or interlocutory entries—as findings of "the amount which *should* be credited on taxes due and the amount *to be* refunded," requiring the approval of the Commissioner to make them effective. (*Ante*, 9.)

In *Stotesbury* v. *United States*, 146 U. S. 196, 36 L. ed. 940, the Commissioner of Internal Revenue had signed a schedule of claims for the refunding of erroneously collected taxes at the bottom of a certificate reading:

> "I hereby certify that the foregoing claims for the refunding of taxes erroneously assessed and paid have been examined *and allowed*, and are transmitted to the Secretary of the Treasury for his consideration and advisement." (146 U. S. 196, 36 L. ed. 941.) [Italics ours.]

And the question was whether this constituted a final allowance of the claims.

Conceding that "the power of final decision is vested in the Commissioner, and that there is no appeal from

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43 Amer. Decs. 540, 543-544; *Mechem on Public Officers*, §§ 567, 568.) Indeed, even where the act is ministerial or executive in its nature, if, as here, the law expressly requires it to be done by a particular officer it cannot be delegated to another. (35 Op. A. G. 15, 21; *Mechem on Public Officers*, § 568.)

him to the Secretary of the Treasury," and that the only effect of transmitting the schedule to the latter was to afford him an opportunity to give advice if he desired (146 U. S. 200, 36 L. ed. 942), the Court nevertheless held that the sending of the schedule to the Secretary even for this limited purpose indicated that the Commissioner had made no final decision though the certificate signed by him stated that the claims *have been allowed*.

Even less could the signing by the Commissioner of the Schedule of Overassessments have been a final allowance of the claim for credit in the present case, because not only was the schedule transmitted to another officer for a report, but until that report was received the Commissioner did not know what amount to allow as a credit, or whether the taxpayer was entitled to any credit at all for that matter.

**b. The Commissioner had no authority to allow a credit at the time he signed the Schedule of Overassessments.**

Prior to the passage of the Revenue Act of 1918 the authority now vested in the Commissioner to allow an overpayment of taxes for one year to be credited on taxes due and unpaid for another year did not exist. (A. R. M. 123, Cum. Bul. No. 4 pp. 330-332; L. O. 1106, Cum. Bul 1-2, p. 221; S. M. 4170, Cum. Bul. IV-2, pp. 102, 103.)

Section 252 of that Act granted such authority in the following terms:

> "That if, upon examination of any return of income * * * *it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due,*

> then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installments thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer * * *." [Italics ours.]

This provision was reenacted verbatim in the Revenue Act of 1921, §252, and without material change in the Revenue Act of 1924, §281, the Revenue Act of 1926, §284, and the Revenue Act of 1928, §322. There is no other law on the subject. (L. O. 1106, Cum. Bul. 1-2, p. 221.)

Thus, no authority has ever existed under the law to allow a credit *until* "it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due," or in the language of the later acts, *until* it appears that "there has been an overpayment of any income, war-profits or excess-profits tax."

"When a statute limits a thing to be done in a particular mode it includes the negative of any other mode." (*Botany Worsted Mills* v. *United States*, 278 U. S. 282, 289, 73 L. ed. 379, 385. See also *Farrell* v. *United States*, 99 U. S. 221, 224, 25 L. ed. 321, 322.)

This limitation upon the authority to allow a credit was early recognized by the Bureau of Internal Revenue itself. Opinion 957 of the Solicitor of Internal Revenue held:

> "* * * It [Revenue Act of 1918, §252] provides only for the allowance of the credit when 'it *appears* that an amount of income, war profits, or excess profits tax has been paid in excess

> of that properly due.' * * * It is only the amount of the excess which can be credited against assessments upon another return and the amount of the excess can only be known when the merits of the claim for refund have been determined. It is clear then that the word 'appears' as used in this section is equivalent to '*has been ascertained.*'" (Cum. Bul. No. 1, pp. 256, 257.) [Italics ours.]

Now, at the time the Commissioner, in whom alone authority to allow credits is vested, first decided that there had been an overassessment and signed and forwarded to the Collector a schedule thereof, it had not *appeared* that the amount of tax paid was in excess of that properly due. As already seen (*ante*, 18-20), the Commissioner's decision that there had been an over*assessment* was not a decision that there had been an over*payment*. That depended upon what part, if any, of the tax assessed had been paid, and what part, if any, had been abated. In other words, it depended upon the state of the taxpayer's account, and that account was kept by the Collector. (*Girard Trust Company Case*, 270 U. S. 171, 70 L. ed. 529.)

It follows that until the Schedule of Overassessments was returned to the Commissioner with the Collector's report showing whether there had been an overpayment, and if so, the amount of it, the Commissioner *had no authority* under the law to allow a credit.

**c. A credit can not be allowed until the amount is fixed finally by the Commissioner, and that had not been done at the time the Schedule of Overassessments was signed.**

As already shown, there can be no allowance by the Commissioner of Internal Revenue of either a credit

or a refund until the amount has been fixed finally by him. (*Ante*, 10-12.)

At the time the Commissioner signed the Schedule of Overassessments he not only had not fixed the amount of the credit but did not even know whether there would be any credit. (*Ante*, 18-19.)

3. THE CONTENTION THAT THE COMMISSIONER'S APPROVAL OF THE SCHEDULE OF REFUNDS AND CREDITS RELATED ONLY TO REFUNDS.

It is contended that the signing by the Commissioner of the Schedule of Refunds and Credits could not constitute an allowance of a credit because what appeared immediately above his signature contained no reference to credits but was merely a direction to the Disbursing Clerk of the Treasury to pay the refunds found due. (Govt. Br., 23.)

This takes too literal a view of the matter. The schedule, as its title indicates, is a statement of credits, as well as of refunds, found by the Collector to be due the taxpayers named therein. Moreover, what the Commissioner subscribed was a direction to the Disbursing Clerk to pay not only the refunds found due, but interest on the credits found due, and his signature at that place, by necessary implication, if not expressly, constituted his approval of the findings of his subordinates as therein set forth with respect to overpayments made by the taxpayers named, and the amounts that should be credited and refunded, respectively. In short it was the act which made the schedule effective as an award or allowance.

This Court so construed the action of the Commissioner in the *Girard Trust Company Case*. Thus, referring to the Collector's report to the Commissioner of "the amount which should be credited on taxes due and the amount to be refunded," the opinion states, "that this is examined by the Assistant Commissioner and then is delivered to the Commissioner, who makes it effective by his approval." (270 U. S. 171, 70 L. ed. 529.)

Besides, as stated in the same opinion—

> "Allowance in its ordinary sense does not mean payment, and in the practical administration of the Treasury Department the two things are quite different. The one is a decision by the competent authority that the payment should be made. The other is the actual payment." (270 U. S. 169, 70 L. ed. 528.)

If, then, as the Government's brief states (p. 23), the signing by the Commissioner of the Schedule of Refunds and Credits "was no more than an authorization to the Disbursing Clerk to pay to the taxpayers entitled thereto the refunds and interest due," it would no more constitute an allowance of a refund than of a credit.

This argument, therefore, if valid at all, could be made with equal force as regards the allowance of *refunds*, and *was* made in the *Girard Trust Company Case*, 270 U. S. 163, 70 L. ed. 524, and in the *Birkenstock Case*, 271 U. S. 348, 70 L. ed. 983, but was overruled.

Let it be supposed, however, that the signing by the Commissioner of the Schedule of Refunds and Credits

constituted an allowance of refunds only. Allowance of credits would then have to be sought in some other act of the Commissioner subsequent to the receipt of the Collector's report.

It would have to be sought in some other act of the *Commissioner*, because he "is the final judge in the administrative branch of the Government to decide * * * that a refund or credit should be granted." (*Girard Trust Company Case, ante,* 7-8.) And the act must be *subsequent* to the Collector's report, because until then, as elsewhere shown, the Commissioner had neither the necessary information nor the authority to allow a credit. (*Ante,* 23-25.)

One such act is the mailing by direction of the Commissioner to each taxpayer listed in the Schedule of Refunds and Credits of a Certificate of Overassessment showing the amount of the overassessment abated, credited, or refunded. In the present case that was done September 26, 1923. (Special Findings of Fact, XII, Rec., 16.)

The brief for the Government states that after the Commissioner signs the Schedule of Overassessments "he never thereafter, either in a certificate of any kind or in a communication to the Collector, directs an allowance of a credit or refers to the allowance of a credit," and that the Court below disregarded this fact. (P. 22.)

There is no occasion for the Commissioner to communicate to the Collector any directions to allow a credit. The Commissioner must allow the credit himself. (*Ante,* 7-8, 21.)

The further statement that after signing the Schedule of Overassessments the Commissioner never there-

after notified the Collector of the allowance of a credit is erroneous. *After* both that schedule and the Schedule of Refunds and Credits had been signed by him Certificates of Overassessment addressed to the respective taxpayers, and upon which now for the first time appeared the amounts allowed by the Commissioner by way of credit or refund, "were dated and returned to the Collector for mailing to the taxpayers." (Special findings of Fact XI, Rec., 14-15.)

Certainly, this was notice to the Collector, as it was to the taxpayer, that a credit or refund or both had been allowed.

4. THE CONTENTION THAT THE PRACTICE OF THE BUREAU OF INTERNAL REVENUE HAS BEEN TO TREAT A CREDIT AS ALLOWED WHEN THE COMMISSIONER SIGNS THE SCHEDULE OF OVERASSESSMENTS.

The Government's brief states:

> "The Bureau of Internal Revenue has consistenly taken the position that a credit is allowed when the Commissioner of Internal Revenue signs the schedule of overassessments except during the period when Treasury Decision 3850, Cumulative Bulletin V-1, p. 354, was in effect." (Pp. 25-26.)

The same alleged practice was invoked without success in the *Girard Trust Company Case* as determinative of the date of allowance of refunds and credits alike. (*Ante*, 8.)

A practice of the Bureau of Internal Revenue, even when consistent and long-continued, cannot determine what constitutes an allowance of a claim for credit any more than a claim for refund. (Compare *United States* v. *Dickson*, 15 Pet. 141, 161-162, 10 L. ed. 689,

697, cited in *United States* v. *Missouri P. R. Co.*, 278 U. S. 269, 280, 73 L. ed. 322, 378.) The law determines that. And the law as declared by this Court requires that the amount be fixed finally by the Commissioner before a claim for credit or refund can be deemed allowed. (*Ante*, 10.) It follows that no practice of the Bureau of Internal Revenue could make the allowance of a credit any more than the allowance of a refund take place when the Commissioner signs the Schedule of Overassessments, because at that time the Commissioner, so far from having fixed the amount of the credit or refund, does not even know that there will be one. (*Ante*, 18-19.)

As a matter of fact the position of the Bureau of Internal Revenue with respect to this matter was anything but consistent.

On the one hand Article 1040 of Regulations 62 of 1922 relating to the computation of interest provided:

> "A claim for refund or credit is allowed within the meaning of the statute when the Commissioner approves the schedule in whole or in part, for transmission to the proper accounting officer, for credit or refund."[1]

But turning to the schedule referred to in this article of the regulations—the Schedule of Overassessments—it will be seen that it did not even purport to be an allowance by the Commissioner of a credit or refund. It was merely an allowance of a "reduction of tax liability"—a determination of an overassessment—

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[1] This is the provision of the regulations that this Court rejected in the *Girard Trust Company Case.* (*Ante*, 8.)

which is but the first step in the allowance of a credit or refund. (*Ante*, 17-18.)

Again, under the early practice, as found in the *Iron Cap Copper Company Case*, "before the Commissioner could prepare a Schedule of Credits * * *, he had to have information from the Collector's office as to what taxes were due and how much the taxpayer had paid." (No. 633, Rec., 38.) This is entirely inconsistent with the position that a claim for credit is allowed when the Schedule of Overassessments is signed because at that time the Commissioner had no information as to taxes paid or taxes owing by the claimant.

Again, Treasury Decision 3260 stated:

> "Upon receipt of such schedules [Schedules of Overassessments] the several collectors of internal revenue shall immediately check the items thereon against the accounts of the several taxpayers concerned and determine whether the several amounts of overassessments *should* be abated, refunded or credited against assessments remaining unpaid." (Cum. Bul. No. 5, p. 243.) [Italics ours.]

This also is inconsistent with the position that the Commissioner allowed a credit when he signed the Schedule of Overassessments.

Again, in the Schedule of Refunds and Credits on which the Collector made his report to the Commissioner after receiving the Schedule of Overassessments and examining the taxpayer's account, the amounts set forth as due the taxpayer by way of credit or refund were described in the certificate of the collector as items that "*appeared* for refund or credit," and as items "*subject* to refund or credit."

Again, the Certificate of Overassessment, which was not dated nor forwarded to the taxpayer until after the Schedule of Overassessments had been signed by the Commissioner and transmitted to the Collector and returned, states:

> "The amount of the overassessment *will* be applied as follows: * * * if the tax has been paid, the amount of the overpayment *will* either be credited * * *, etc., etc."

So far, therefore, from being consistent on this point, the practice of the Treasury Department tended more strongly against than for the view that a credit was allowed when the Commissioner signed the Schedule of Overassessments, so much so, indeed, that the understanding of Congress was that the signing of the Schedule of Overassessments was only the first step. Thus the report of the Senate Committee on Finance on the Revenue Act of 1926, describing the practice, states:

> "In practice, the Commissioner *first* signs a Schedule of Overassessments, which is sent to the Collector, *in order to determine whether the overpayment should be credited or refunded.*" (Sen. Rep. No. 52, 69th Cong., 1st Sess., p. 38.) [Italics ours.]

5. THE CONTENTION BASED ON ALLEGED DIFFERENCES IN DEPARTMENTAL PROCEDURE WITH REGARD TO CREDITS AND REFUNDS, RESPECTIVELY.

The Government's brief states that "the difference in procedure followed by the Treasury Department in the allowance of a refund and of a credit was not specifically brought to the attention of the Court" in the *Girard Trust Company Case*. (P. 7.)

There were no differences of any consequence. The entire procedure as regards both credits and refunds, leaving out unessential detail, was as follows: The first step was the Commissioner's decision that there had been an overassessment, which was forwarded to the Collector in the form of a Schedule of Reductions of Tax Liability or Schedule of Overassessments. The Collector then ascertained from his books whether any part of the overassessment was an *overpayment,* and if so how much should be held as a credit against unpaid assessments for other years and how much refunded. He then entered these amounts on the Schedule of Overassessments, and on a subsidiary schedule called the Schedule of Refunds and Credits, under the headings "Amount Credited" and "Net Amount Refundable," respectively, and returned both schedules to the Bureau of Internal Revenue. There the Collector's report was examined and if found correct the Commissioner signed the Schedule of Refunds and Credits. (Special Findings of Fact, XI, Rec., 15.)

The only real point of divergence is that the allowance of a credit requires an additional decision by the Commissioner after he has received the Collector's report, which is not required in the case of a refund only, namely, whether the unpaid assessments against which it is proposed to apply the overpayment as a credit are legally collectible. (Solicitor's Law Op. 1095, Cum. Bul. I-1, pp. 313, 314, 315.) That, however, makes it even clearer in respect of credits than in respect of refunds that there can be no allowance until the Collector has returned the schedules to the Commissioner with the entries showing the state of the taxpayer's account.

The Government's brief states further that prior to November 23, 1921, and after January 1927, the Schedule of Refunds and Credits was not in use, and that during those periods the Collector's report was not entered on any subsidiary schedule signed by the Commissioner, and that therefore if the rule is that a credit is only allowed when the Commissioner signs such a schedule, "credits totaling millions of dollars have been allowed without authority," and the suggestion is that the Government could be required to refund these millions. (Pp. 24-25.)

The short answer is that this is an essentially different procedure from that involved in the present cases. The present cases, like the *Girard Trust Company Case*, arose in the period when the amounts to be credited, as well as the amounts to be refunded, as ascertained and reported by the Collector, *were* entered on a subsidiary schedule which the Commissioner *did* sign. (Special Findings of Fact, XI, XII, Rec., 14-16.)

It will be time enough when the question arises, *and all the facts are presented*, to consider what would constitute allowance of a credit under the essentially different course of business alleged to have prevailed at other times.

Besides, even if it should turn out that "credits totaling millions of dollars" were collected without authority under the practice prevailing prior to November 23, 1921 and after January 1927, it would not follow that the Government would have to refund the money. Rather, the presumption is that with respect to the earlier years recovery would be barred by the statute of limitations, and that with respect to the

period after January 1927 there would still be time in most cases to collect whatever taxes are due.

The Government's brief also states that where no refunds and no credits on which interest must be paid were listed on a Schedule of Refunds and Credits the schedule was filed without being signed by the Commissioner.[1] (P. 24.)

Inasmuch as the statute has provided for interest on credits ever since the Schedule of Refunds and Credits came into use,[2] such a case would be very unusual, and as Mr. Justice Story said in *United States* v. *Dickson*, 15 Pet. 141, 164, 10 L. ed. 689, 698, "to put an extreme case is not a good test of the fair and just interpretation of any statute."

Here again, moreover, it will be time enough to decide what constitutes the allowance of a credit in such an exceptional case when it arises (if it ever does) and all the facts are presented.

It is sufficient now to say that it is the Commissioner's "approval" of the Collector's report which this Court held constituted allowance of a claim for credit or refund in the *Girard Trust Company Case*, and such approval might be indicated in other ways than by signing the Schedule of Refunds and Credits. It

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[1]The statement is based on a finding in the *Iron Cap Copper Company Case*. No such finding was made in *the Boston Buick Company Case* nor in the present case.

[2]Interest on refunds and credits was first provided for in the Revenue Act of 1921. The Schedule of Refunds and Credits came into use in February 1923. (Special Findings of Fact, XIII, Rec., 16-17.)

might be indicated by the mailing of the Certificate of Overassessment notifying the taxpayer of the amount credited (*ante*, 28), or it might be implied from the course of business.

Similar contentions were answered by the Circuit Court of Appeals in the *Boston Buick Company* and *Iron Cap Copper Company Cases* as follows:

> "Even if large sums have been credited to taxpayers without the signature of the Commissioner on the Collector's report after it is returned to his office, it cannot change the law, though it does not follow from facts stated by counsel in argument that the Commissioner's assent to the report of the Collector may not in each case have been implied." (35 Fed., 2d, 563.)

In connection with the subject of administrative practice, the Government's brief mentions, without showing how it is material, that the Revenue Act of 1926, § 1116 (b) (2), provided that refunds should be regarded as allowed on the date when the certificate [schedule] of overassessment was signed (p. 26), as the Treasury had contended and contrary to the decision of this Court in the *Girard Trust Company Case*. This provision was repealed in the very next revenue act, Revenue Act of 1928, § 614 (c), and, of course, never was applicable to cases arising before its enactment. (See *Blair, Comr.*, v. *United States ex rel. Birkenstock*, 271 U. S. 349-350, 70 L. ed. 983-984.)

## Point II.

**Assuming as asserted by the Government that the credit was allowed February 9, 1923, when the Commissioner signed the Schedule of Overassessments for transmission to the Collector, it did not take effect as a payment of 1917 taxes so as to start the running of the period of limitations for filing claims for refund until notice of the allowance was received by the taxpayer, which was not earlier than September 26, 1923, the date of the Certificate of Overassessment.**

Treasury Regulations 62, Art. 1035, under the Revenue Act of 1921, which were in force when the claim for credit in this case was allowed, expressly provided that "due notice will be given * * * the taxpayer of the action taken on the claim."

The taxpayer's first and only notice that a credit has been allowed is the Certificate of Overassessment[1] (Special Findings of Fact, XI, Rec., 16), and that is not sent to him until after the Commissioner has received from the Collector and approved the Schedule of Refunds and Credits. (*Ibid.*) Until then the whole matter remains locked in the breast of the Commissioner. "The schedule of assessments which the Commissioner approves is not a record open to the public, but is an interdepartmental document, and the tax-

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[1]Regulations 69, Article 1302, provided: "Overassessments and overpayments of income and profits taxes will be adjusted by means of certificates of overassessment." See also Regulations 65, Article 1302, (2), and Regulations 62, Article 1031 (a), (b).

payer apparently has no authoritative information as to the decision of the Commissioner except the prescribed notice by mail." (*Michel* v. *United States*, Jan. 6, 1930, — Fed., 2d, —, C. C. A. 2d.)

Nor is there any limit to the time which may intervene between the signing of the Commissioner's authorization to the Collector on the Schedule of Overassessments, and the signing of the Schedule of Refunds and Credits, or between the signing of the latter and the mailing of the Certificate of Overassessment. All that is entirely within the control of the Commissioner. In the present case seven months elapsed between the signing of the Schedule of Overassessments and the signing of the Schedule of Refunds and Credits, and nearly a month more before the taxpayer was notified of the Commissioner's action by receipt of the Certificate of Overassessment on or about September 26, 1923.

Therefore, where payment of a tax is effected by crediting against it an overpayment for another year, unless the *date of notice* of the credit, rather than the date of allowance, be taken as the date of payment of the tax for the purposes of the statute of limitations, the time limited by law for filing a claim for refund or bringing suit to recover an illegally collected tax would be running against the taxpayer without his having any means of knowing it. In other words, by delaying notice to the taxpayer the Commissioner could cut down at will the statutory period of limitations. "It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute." (*Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348, 73 L. ed. 410, 415.)

Compare *Michel* v. *United States, ante,* where the Circuit Court of Appeals, 2nd Circuit, held that the period prescribed by Revised Statutes §3226, as amended, within which to bring suit on a claim for refund, namely, two years from the disallowance of the claim, does not commence to run until the taxpayer has received notice of the disallowance as provided for by the statute. A like decision was made by the District Court, Northern Ohio, in *Mahoning Coal R. Co.* v. *United States*, 28 Fed. (2d) 917.

## Point III.

**Regardless of whether the claim for refund filed September 3, 1927, was in time, the original claim filed February 28, 1923, admittedly within the prescribed period,[1] was sufficient to satisfy the statutory condition precedent to bringing suit for the recovery of the illegally collected tax, but granting that it was not, it clearly indicated the general nature of the claim, and therefore could be perfected by amendment as well after the expiration of the period of limitations as before, and was perfected by the claim filed September 3, 1927.**

1. Revised Statutes, § 3226, as amended, provides that no suit shall be maintained for the recovery of erroneously or illegally collected internal-revenue taxes

> "until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in

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[1]Special Findings of Fact, VII, Rec., 13.

> that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof."

The "provisions of law in that regard," so far as applicable in the present case, are § 252 of the Revenue Act of 1921 and § 284 (b) (1) of the Revenue Act of 1926, neither of which lays down any requirements as to the form or contents of such claims. Both provide merely that no refund or credit shall be allowed after a specified time (five years from the date when the return was due, or four years from the date the tax was paid),

> "unless before the expiration of such period a claim therefor is filed by the taxpayer."

While the Treasury regulations under the Revenue Acts provide that "all the facts relied upon in support of the claim should be clearly set forth under oath" to be workable this must be construed as referring not to evidential facts but to the *ultimate facts* only—such facts, at most, as would have to be stated in the initial pleading in an action in the courts; and even in that restricted sense failure to observe the regulations, as this Court has said, "does not necessarily preclude recovery." (*Tucker* v. *Alexander*, 275 U. S. 228, 231, 72 L. ed. 253, 256.)

The original claim stated a number of grounds, making brevity of statement desirable. The particular ground involved here, reading, "Foreign Dividends Overstated" (Pet., Ex. A, Rec., 8-9), while abbreviated like the rest, could mean only one thing—that amounts had been included in the taxpayer's return of income for 1917 as dividends received from a foreign com-

pany or companies which should not have been included because not a part of the taxpayer's income for that year.

This was a sufficient statement of claim to meet the condition of the statute that no refund or credit shall be allowed after five years from the date when the return was due, or four years from the time the tax was paid, as the case might be, "unless before the expiration of such period a claim therefor is filed by the taxpayer." Revenue Act of 1921, § 252; Revenue Act of 1926, § 284 (b) (1).

We do not mean to suggest, of course, that this statement of claim included all the facts necessary to a decision. But all other facts, i. e., the details of the case, could be supplied and were supplied in supplemental statements in the nature of bills of particulars, as in actions at law.

2. But granting that the original claim was not sufficient of itself, it could be perfected by amendment as well after the expiration of the period of limitations as before. In other words, it was sufficient to stop the running of the statute of limitations.

The Bureau of Internal Revenue itself holds that a claim for refund which falls short of meeting the requirements of the regulations may still be sufficient to stop the running of the statute of limitations. Thus:

> "Even in the case of refund claims, where regulations in reference thereto are required by the statute, the Bureau, following the opinion of the Attorney General (14 Op. A. G. 615), has *consistently* held that an informal claim is sufficient to stop the running of the statute of lim-

itations." (G. C. M. 499, Cum. Bul. V-2, 171, 173.) [Italics ours.]

Of course, a claim for refund may be so vague and intangible as to be of no effect for any purpose, and therefore incapable of arresting the statute of limitations; as, for example, a claim "for amounts paid by it [the taxpayer] in taxes which, through lack of information as to requirements of law, or by error in computation, it may have paid in excess of the amount legally due" (see *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 354, 64 L. ed. 297, 304), or a claim which "merely asserted that the statute was unconstitutional and that the regulations were not in accordance with the statute" (see G. C. M. 1020, Cum. Bul. VI-1, 119, 121).

But, under the Treasury's own practice, it is enough to support an amendment after the statute of limitations has run if the taxpayer's statement of claim sets forth "the *general nature* of his claim or information that would indicate a possible error in the computation of the tax liability for the taxable year for which the overpayment was made." (G. C. M. 4355, Cum. Bul. VII-2, 175. [Italics ours.]

In *Louisville & N. R. Co.* v. *Sloss-Sheffield S. & I Co.*, 269 U. S. 217, 226-227, 70 L. ed. 242, 247, this Court held that a complaint against a carrier before the Interstate Commerce Commission praying reparation on account of unreasonable rates, which did not set forth the points of origin and destination, or the dates of the shipments, or the quantities shipped, or the charges paid, or any other particulars of the claim, could be perfected by amendment after the statute of limitations had run.

This rule is subject, of course, to the qualification that the amendment must be limited to developing or correcting the statement of the claim or cause of action as originally made. No new cause of action may be brought in at that stage.

Applying the rule to the present case, the original claim for refund included a number of different grounds, as we have seen. The particular ground of claim in controversy, reading "Foreign Dividends Overstated," could only mean, as before stated, *that amounts had been included in the taxpayer's return of income for* 1917 *as dividends received from a foreign company or companies which should not have been included because not a part of the taxable income for that year.* This, certainly, was sufficient to indicate the general nature of the claim.

The amended claim, in alleging the name of the company paying the dividend, the amount thereof, and the reason why it was not income of the taxpayer for 1917, namely, because it was a stock dividend, supplied the particulars of the claim.

True, the reason alleged in the amended claim for excluding the dividend from Swift and Company's taxable income for 1917 was new, but there is a fundamental distinction between an amendment which merely alleges a new theory or contention in support of the *same* claim or right of action and an amendment which sets up a *different* claim or right of action. (*Baltimore Steamship Co.* v. *Phillips*, 274 U. S. 316, 321, 71 L. ed. 1069, 1072; *Friederichsen* v. *Renard*, 247 U. S. 207, 210, 62 L. ed. 1075, 1083; *United States* v. *California & O. Land Co.*, 192 U. S. 355, 48 L. ed. 476;

1 Corp. Jur. 1056-1057; *Clark on Code Pleading*, 1928, p. 513.)

Here, only *one* claim or right of action was asserted—*the right to recover an overpayment of income and war excess profits taxes for 1917 caused by including as a part of the taxpayer's income for that year a dividend which was not such.*

This Court has said that the statute and regulations relating to claims for refund were devised, "not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial." (*Tucker v. Alexander*, 275 U. S. 228, 231, 72 L. ed. 253, 256.) The original claim in this case, as amended, completely fulfills this purpose.

## Conclusion.

The petition should be denied because the question sought to be reviewed has already been decided by this Court, and because in any event the decision of the Court of Claims is clearly right, and there is no conflict of decisions, but accord.

G. CARROLL TODD,
*Attorney for Respondent.*

March 7, 1930.

Office Supreme Court, U. S.
FILED
JAN 7 1931
CHARLES ELMORE CROPLEY
CLERK

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

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## No. 56

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THE UNITED STATES, PETITIONER,

*v.*

SWIFT AND COMPANY, RESPONDENT.

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*ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.*

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## BRIEF FOR RESPONDENT.

---

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

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## No. 56

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THE UNITED STATES, PETITIONER,

*v.*

SWIFT AND COMPANY, RESPONDENT.

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*ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.*

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## BRIEF FOR RESPONDENT.

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### Statement of the Case.

The judgment under review is for the recovery of an overpayment of income and excess-profits taxes for 1917. 68 Ct. Cl. 97. The case has been advanced for hearing immediately following Nos. 42 and 43, *United States* v. *Boston Buick Company* and *United States* v. *Iron Cap Copper Company.*

All three cases present this question: Where a taxpayer has overpaid his tax for one year and the overpayment is credited in whole or in part on taxes due

for other years, when does *allowance* of the credit take place?

The question arises in the present case in determining whether one of the two claims for refund relied upon was filed within four years from the time the tax was paid, payment having been effected through the allowance of a credit. In the other cases the question arises in determining the date to which to compute interest on credits.

The lower courts all held that the question was settled by this Court in *Girard Trust Co.* v. *United States*, 270 U. S. 163, 70 L. ed. 524.

The respondent in the present case included in its return of net income for 1917 a stock dividend of $2,068,000 received from the Compania Swift de Montevideo, S. A., a corporation of Uruguay. (Findings III, IV, V, Rec. 12, 13.) That was before it had been decided that stock dividends are not income within the meaning of the Sixteenth Amendment. (Finding V, Rec. 13.)

Because of the erroneous inclusion of this stock dividend in the respondent's 1917 return of income the amount of income and excess-profits taxes assessed against and collected from it for that year exceeded the amount lawfully owing by $498,961.29. (Finding VI, Rec. 13.)

The Government admits the overpayment. (Br. 2.) The point in dispute is whether recovery of it is barred by Revised Statutes, § 3226, U. S. C., Tit. 26, § 156, for failure to file a sufficient claim for refund within the period prescribed by law—five years from the date when the return was due, Revenue Act of 1921, § 252, or four years from the time the tax was paid, Revenue Act of 1926, § 284, (b) (1).

On February 28, 1923, and admittedly within the

prescribed period, the respondent filed a claim for the refund of income and excess-profits taxes paid for the year 1917 on the ground, amongst others, of "Foreign Dividends Overstated." (Pet., Ex. A, Rec. 8-9; Finding VII, Rec. 13.)

Besides the dividend of $2,068,000 received from the Compania Swift de Montevideo, S. A., the respondent received dividends in 1917 from various other foreign corporations, all of which the Commissioner of Internal Revenue treated as income of the respondent for 1917 to the extent of the earnings of the respective corporations for that year. Under the claim for refund filed February 28, 1923, the respondent contended before the Commissioner that none of these dividends should be included in its income for 1917 for a common reason, namely, that in each instance the dividend had been specifically declared out of earnings for years prior to 1917, and there being earnings for those years sufficient for the purpose, the dividend should be treated as income of the respondent for those years, and not for 1917, under § 1211 of the Revenue Act of 1917 as construed by the Circuit Court of Appeals for the Second Circuit in *Douglas* v. *Edwards*, 298 Fed. 229. On April 24, 1926, this contention was overruled by the Commissioner, this Court having reversed the decision of the Circuit Court of Appeals on November 23, 1925, 269 U. S. 204, 70 L. ed. 235. (Finding VIII, Rec. 13.)

Thereafter, on September 3, 1927, the respondent filed a second claim for refund by way of amendment of the first, alleging therein that the dividend of $2,068,000 received from the Compania Swift de Montevideo, S. A., was improperly included in its taxable income for 1917 because it was a stock dividend and

therefore not taxable under the Acts of Congress. (Pet., Ex. B, Rec. 10-11; Finding IX, Rec. 14.)

If, as the Government contends, the second claim cannot be treated as an amendment of the first, whether as an independent claim it was filed in time depends upon when the last payment of 1917 taxes was made.

The last payment by the respondent of income and excess-profits taxes for 1917, amounting to $2,813,012.05, was effected by the Commissioner's allowing as a credit that much of an overpayment of 1918 taxes, under authority of § 252 of the Revenue Act of 1921. (Finding X, Rec. 14.)

The proceedings in connection with the allowance of the credit were as follows: Under date of February 9, 1923, the Commissioner, in accordance with the established procedure, signed and forwarded to the Collector of Internal Revenue for the First District of Illinois a Schedule of Reductions of Tax Liability (Form 7777), later called Schedule of Overassessments, in which was included an overassessment of income and excess-profits taxes for 1918 found to have been made against the respondent in the amount of $10,304,753.94.[1] At the same time he forwarded to the Collector undated Certificates of Overassessment addressed to the respective taxpayers named in the schedule and showing the amount of the overassessment against each. On July 25, 1923, the Collector returned this schedule to the Commissioner, and also made a report on a Schedule of Refunds and Credits (Form 7805A), showing on both what portions of the overas-

[1] This reduction in the 1918 tax liability was due principally to deducting a large 1919 net loss pursuant to § 204 (*b*) of the Revenue Act of 1918.

sessments were overpayments, if any, and how the overpayments should be distributed as between credits and refunds, according to his books. With respect to the overassessment of $10,304,753.94 against the respondent, the Collector's report showed an overpayment of $4,953,575.50 (the balance of the overassessment having been abated); that out of this overpayment certain amounts were applicable as credits against taxes due for other periods, including an item of $2,813,012.05, the amount of an additional assessment of income and excess-profits taxes for 1917; and that the balance, $735,028.10, was refundable. At the same time that these schedules were forwarded by the Collector to the Commissioner the Collector returned to the Commissioner the Certificates of Overassessment in the cases of the taxpayers named on the Schedule of Refunds and Credits, including the respondent. Thereafter, under date of September 6, 1923, the Schedule of Refunds and Credits was signed by the Commissioner, the Deputy Commissioner having first signed it; and under date of September 26, 1923, the Certificate of Overassessment addressed to the respondent, showing the amount of the overassessment, and the portion thereof abated, the portion allowed as a credit, and the portion allowed as a refund, was mailed to the respondent and duly received. (Findings XI, XII, Rec. 14-16.)

It is stipulated that—

> "If the claim for refund filed February 28, 1923, either alone or in connection with the claim filed September 3, 1927, is sufficient in law, or if the claim filed September 3, 1927, independently of and apart from the claim filed February 28, 1923, was filed within the time required by law, there is due and owing the plaintiff on account of overpayment by it of income and

war excess-profits taxes for the taxable year 1917 a refund of $498,961.29, together with interest at the rate of 6 per cent per annum from the date of the overpayment, to wit, the date on which the credit of $2,813,012.05 referred to in finding X, above, became effective." (Finding XVI, Rec. 17.)

**Decision of Court of Claims.**

The Court of Claims rejected the original claim for refund filed February 28, 1923, as inadequate in failing to allege specifically as a ground of claim that the dividend in question was a stock dividend, but held that the claim filed September 3, 1927, admittedly sufficient in its statement of the ground of claim, was filed within the prescribed period of four years from the date of payment of the tax, and accordingly gave judgment for the amount of the overpayment with interest as provided by law.

As the last payment of 1917 taxes was made by applying an overpayment of 1918 taxes as a credit (*ante*, 4), whether the claim filed September 3, 1927, considered independently of the original claim, was filed within the four years depends upon when the credit was allowed or took effect as a payment. The Court of Claims held, on the authority of *Girard Trust Co.* v. *United States*, 270 U. S. 163, 70 L. ed. 524, that the credit was allowed not earlier than September 6, 1923, when the Commissioner approved the Schedule of Refunds and Credits showing the portions of the 1918 overpayment that should be credited and refunded, respectively, as reported by the Collector.

## Summary of Argument.

I. In accordance with the decision of the Court of Claims, the respondent maintains that under the law as construed by this Court in the *Girard Trust Company Case* neither a credit nor a refund is allowed until the Commissioner, after signing and transmitting to the Collector the Schedule of Overassessments, receives back the Collector's report showing what part of the over*assessment* listed in the Schedule of Overassessments was an over*payment* and, if any, how much should be credited against taxes for other years and how much refunded, and "makes it effective by his approval"—September 6, 1923, in the present case.

The Government on the other hand, disregarding the settled distinction between the determination of an overassessment and the allowance of a credit or refund, maintains that a credit is allowed when the Commissioner signs the Schedule of Overassessments—February 9, 1923, in the present case.[1]

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[1] The argument for the Government throughout, both in this case and in Nos. 42 and 43, discloses a misapprehension of the respondents' contention and the rulings below on this point. For example, in this case it speaks of the respondent as contending and the Court of Claims as holding that the credit was not allowed "until the Commissioner signed the authorization to the Disbursing Clerk to pay the amounts which appeared to be refundable on the Schedule of Refunds" (No. 56, Govt. Br. 6-7, 8), and in Nos. 42 and 43 it speaks of the Circuit Court of Appeals as "holding that the allowance of a credit occurred when the Commissioner of Internal Revenue certified to the Disbursing Clerk of the Treasury that the amounts shown to be refund-

As the Collector keeps the accounts with the taxpayer, until his report is received the Commissioner does not even know whether there has been any overpayment out of which to allow a credit, or, if there has been an overpayment, whether there are any unpaid assessments against which to credit it, so that the Government's contention, if adopted, would put the Commissioner in the position of allowing a credit not only when he does not know what amount to allow, but when the Collector's report in some cases would show no overpayments at all and therefore nothing to credit and in others no unpaid assessments against which to credit any overpayment if there were one.

The Government's contention was rejected as contrary to the decision in the *Girard Trust Company Case*, not only by the Court of Claims in this case, but by the District Court of Massachusetts in Nos. 42 and

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able on a Schedule of Refunds, Form 7805-A, should be paid." (Govt. Br. 6-7.)

No such contention or decision was made. What the respondents in all three cases contended for and what the lower courts decided was that a credit, like a refund, is allowed when the Collector's report on the Schedule of Refunds and Credits showing the amount subject to credit and the amount refundable is *approved* by the Commissioner. The signing of the Schedule of Refunds and Credits underneath the authorization to the Disbursing Clerk to make payment of the amounts shown to be due as refunds or as interest on credits was only the symbol of the Commissioner's approval of the Collector's report. (See *post*, 22.) He could have indicated his approval in other ways, or, as observed by the Circuit Court of Appeals, 35 F. (2d) 563, it might even be implied from the course of business.

43, *Boston Buick Co.* v. *United States,* 27 F. (2d) 395, Brewster, J., and *Iron Cap Copper Co.* v. *United States,* 31 F. (2d) 628, Morton, J., and by the Circuit Court of Appeals, First Circuit, affirming the judgments in those cases, 35 F. (2d) 560.

Subsequent to the decision in the present case additional cases involving the date of allowance of a credit came before the Court of Claims, and after reexamining the whole question it reached the same conclusion, Judge Littleton, lately Chairman of the Board of Tax Appeals, writing the opinions. (*West Leechburg Steel Co.* v. *United States,* 69 Ct. Cl. 461, 40 F., 2d., 131; *Atlas Powder Co.* v. *United States,* 69 Ct. Cl. 558, 40 F., 2d., 136; *Pottstown Iron Co.* v. *United States,* 69 Ct. Cl. 427, 40 F., 2d., 142; *Revolution Cotton Mills* v. *United States,* — Ct. Cl. —, 41 F., 2d., 898; *Andrews Steel Co.* v. *United States,* — Ct. Cl. —, 42 F., 2d., 573.)

In no case in which the question was contested has any different view been expressed. The Government's brief mentions faintly *Penn Smokeless Coal Co.* v. *United States,* 34 F. (2d) 205, in the District Court for Western Pennsylvania. But the point was not in controversy there, the Government's brief in that case stating: "Counsel for the plaintiff and for the Government are agreed that a credit is allowed when the Commissioner approves the Schedule of Overassessments for transmission to the proper accounting officer for credit." (*Penn Smokeless Coal Co.* v. *United States,* U. S. Dist. Ct. W. Dist. Pa. No. 5668 L., Deft's Reply Brief, p. 3a.)

Furthermore, as shown in the opinion of the Court of Claims in the present case (Rec. 19), and that of the Circuit Court of Appeals in the *Boston Buick Company* and *Iron Cap Copper Company Cases,* 35 F. (2d) 563,

what the Pennsylvania court supposed was "the rule laid down in *Girard Trust Co.* v. *United States,*" and upon which it expressly based its conclusion that a credit is allowed when the Schedule of Overassessments is signed, was the text of a Treasury regulation which this Court had quoted only to reject as an erroneous interpretation of the statute!

II. Where the tax is paid by the allowance of a credit the statutory period of four years from the date of payment of the tax within which to file claims for refund does not start running until notice of the allowance is received by the taxpayer, which in the present case was not earlier than September 26, 1923, the date of the Certificate of Overassessment.

III. Regardless of whether the claim filed September 3, 1927, considered as an independent claim, was in time, the original claim filed February 28, 1923, admittedly within the prescribed period, was sufficient to satisfy the statutory condition precedent to bringing suit for the recovery of the illegally collected tax, or could be made sufficient by amendment as well after the expiration of the period of limitations as before.

## The Argument.

### Point I.

**The credit by means of which respondent made the last payment of 1917 taxes was allowed September 6, 1923, when the Commissioner of Internal Revenue approved the Collector's report showing the amounts of the 1918 overassessment subject to credit and refund, respectively, so that the claim for refund filed September 3, 1927, fell within four years from the date of payment of the tax.**

1. THIS COURT DECIDED IN GIRARD TRUST CO. v. UNITED STATES, 270 U. S. 163, THAT A CREDIT IS ALLOWED WHEN THE COMMISSIONER, AFTER TRANSMITTING TO THE COLLECTOR THE SCHEDULE OF OVERASSESSMENTS, RECEIVES BACK AND APPROVES THE COLLECTOR'S REPORT ON THE SCHEDULE OF REFUNDS AND CREDITS SHOWING WHAT PART OF THE OVERASSESSMENT WAS AN OVERPAYMENT AND IF ANY HOW MUCH SHOULD BE CREDITED AND HOW MUCH REFUNDED.

The *Girard Trust Company Case* involved the meaning of the words "to the date of such allowance" in § 1324 (a) of the Revenue Act of 1921 providing that "upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit * * * to the date of such allowance."

The Court first stated the general rule for determining what constitutes an allowance of a claim for credit or refund:

> "The Commissioner of Internal Revenue is the final judge in the administrative branch of the Government to decide that an overassessment has been made and that a refund or credit

> should be granted, and when *he* has made that decision *finally*, he has allowed the claim for the refund or credit of the taxes paid within the meaning of the section." (270 U. S. 170, 70 L. ed. 528.) [Italics ours.]

It then rejected the Government's contention that a credit or refund was allowed under the Revenue Act of 1921 when the Commissioner decided that there had been an overassessment and signed and forwarded to the Collector a Schedule of Overassessments, with instructions to examine his books and report back the amounts, if any, that should be credited or refunded. On this point the opinion states:

> "We cannot concur, however, in the view of the Treasury Department that the date of the allowance of the claim as intended by the statute is the date when the Commissioner first decides that there has been an overassessment and sends upon a proper form his decision to the collector of internal revenue, who made the collection and keeps the account with the taxpayer." (270 U. S. 170-171, 70 L. ed. 529.)

If only the Commissioner has authority to allow a claim for credit or refund, and if his decision that there has been an overassessment and his signing of the Schedule of Overassessments and forwarding it to the Collector for a report as to the amounts that should be credited or refunded does not constitute an allowance of the claim, of necessity there can be no allowance until some further act by the Commissioner. The opinion states what that is:

> "The findings and the exhibits show that the course of business is that the collector on receiving from the Commissioner the schedule as to

> the overassessment, examines his books and reports back to the bureau the amount which should be credited on taxes due and the amount to be refunded, that this is examined by the assistant commissioner and then is delivered to the Commissioner, who makes it effective by his approval. Until it reaches him and is approved by him, the refund cannot be paid. This we think is the real date of allowance. Until that time the exact amount of the refund is not fixed finally by competent authority." (270 U. S. 171, 70 L. ed. 529.)

While only refunds were directly involved in the *Girard Trust Company Case*, the Court, as the quoted passages show, expressly put credits on the same footing as refunds for the purpose of determining the date of allowance, and laid down the same rule for both, namely, that the Commissioner "has allowed the claim for the refund *or credit*," not when he "first decides that there has been an overassessment and sends upon a proper form his decision to the collector of internal revenue," but only after the collector "examines his books and reports back to the Bureau the amount which should be *credited* on taxes due and the amount to be refunded," and the Commissioner "by his approval" makes that report "effective."

The Government's brief dismisses these statements, in a foot-note (Nos. 42, 43, Govt. Br. 33), as *dictum*. But they are not, because even though the Court had not in express terms put claims for credit on the same footing as claims for refund as regards what constitutes allowance, that would have followed as a necessary consequence from the ground of the decision.

The ground of the decision was that a claim for refund is allowed when the amount is fixed finally

by competent authority, namely, the Commissioner of Internal Revenue:

> "This we think [the Commissioner's approval of the Collector's report] is the real date of allowance. Until that time the exact *amount* of the refund is not fixed finally by competent authority." (270 U. S. 171, 70 L. ed. 529.) [Italics ours.]

As the allowance of a claim for refund and the allowance of a claim for credit are acts of exactly the same nature and effect—adjudications by the Commissioner of Internal Revenue against the United States for taxes overpaid (*United States* v. *Kaufman*, 96 U. S. 567, 570-571, 24 L. ed. 792, 793)—if a claim for refund is allowed when the amount is fixed finally by the Commissioner, the same must be true of a claim for credit.

The Government's brief seems to us to concede this when it states that "the word 'allowance' is used similarly in regard to both credits and refunds." (Nos. 42, 43, Govt. Br. 20; also 25-26.) This Court having held that allowance in connection with refunds means the final determination by the Commissioner of the amount to be refunded, if used similarly in connection with credits it must mean there the final determination by the Commissioner of the amount to be credited.

Furthermore, the language of the statute itself is, "*Upon the allowance* of a claim for refund *or credit* * * * interest shall be * * * paid upon the total *amount* of such refund *or credit* * * * to the date of such allowance" (*ante*, 11), clearly showing that in the mind of Congress when either a credit or a refund is allowed the amount has been determined.

The rule that a claim for overpayment of taxes is allowed when the amount to be returned is determined by the Commissioner of Internal Revenue was not new with the *Girard Trust Company Case*. In *United States* v. *Kaufman*, 96 U. S. 567, 24 L. ed. 792, the nature and effect of the allowance of a claim for overpayment of taxes was stated as follows:

> "* * * the allowance of a claim under this statute is equivalent to an *account stated* between private parties, which is good until impeached for fraud or mistake. It is not the allowance of an ordinary claim against the Government, by an ordinary accounting officer, but the *adjudication* by the first tribunal to which the matter must by law be submitted. Until so submitted, and until so adjudicated, there is not even a prima facie liability of the Government; but when submitted, and when allowed upon the adjudication, the liability is complete until in some appropriate form it is impeached." (96 U. S. 570-571, 24 L. ed. 793.) [Italics ours.]

And again in *United States* v. *Savings Bank*, 104 U. S. 728, 26 L. ed. 908:

> "An allowance by the Commissioner in this class of cases is not the simple passing of an ordinary claim by an ordinary accounting officer, but a *statement of accounts* by one having authority for that purpose under an act of Congress." (104 U. S. 734, 26 L. ed. 909.) [Italics ours.]

There can be no statement of account, of course, until the amount due is determined.

That a claim is settled or allowed when the amount due is determined by the officer or tribunal authorized by law to make the settlement or al-

lowance has been the rule from the beginning, not alone with respect to claims for overpayments of taxes, but with respect to all classes of claims against the United States for money or money's worth.

In *Illinois Surety Co.* v. *United States*, 240 U. S. 214, 60 L. ed. 609, the construction of the words "final settlement"[1] in the Act of August 13, 1894, as amended (33 Stat. 811), authorizing subcontractors to bring suit on the contractor's bond, "if no suit should be brought by the United States within six months from the completion and final settlement of said contract," was involved. The present Chief Justice, delivering the opinion of the Court, reviewed the whole course of legislative and administrative practice relating to what constitutes the settlement or adjustment of a claim by or against the United States, saying in part:

> "The word 'settlement', in connection with public transactions and accounts, has been used from the beginning to describe *administrative determination of the amount due.* * * * By the Act of March 3, 1817 (3 Stat. at Large 366), it was provided that 'all claims and demands whatever, by the United States or against them, and all accounts whatever, in which the United States are concerned, either as debtors or as creditors, shall be *settled and adjusted* in the Treasury Department.' This provision was carried into § 236 of the Revised Statutes. The

[1] "Settlement" and "allowance" mean the same thing in connection with claims against the United States. Indeed, as just seen, it was expressly stated in *United States* v. *Savings Bank*, 104 U. S. 728, 734, 26 L. ed. 908-909, that allowance by the Commissioner of Internal Revenue of a claim for overpayment of taxes is "but a *statement of accounts* by one having authority for that purpose under an act of Congress." [Italics ours.]

words 'settled and adjusted' were taken to mean the *determination* in the Treasury Department for administrative purposes *of the state of the account and the amount due.* * * *

"We should not say, of course, that instances may not be found in which the word 'settlement' has been used in acts of Congress in other senses, or in the sense of 'payment.' But it is apparent that the word 'settlement' in connection with public contracts and accounts, which are the subject of prescribed scrutiny for the purpose of ascertaining the rights and obligations of the United States, has a well-defined meaning as denoting the *appropriate administrative determination with respect to the amount due.* We think that the words 'final settlement' in the act of 1905 had reference to the time of this determination when, so far as the Government was concerned, the *amount* which it was finally bound to pay or entitled to receive was *fixed administratively by the proper authority.*" (240 U. S. 219-221, 60 L. ed. 614.) [Italics ours.]

The rule operates with even greater force in the case of claims for credit or refund of illegally collected taxes than in the case of ordinary claims, because, as shown later (*post*, 40-42), the very provision of law which authorizes the Commissioner to allow credits and refunds of illegally collected taxes expressly contemplates that the amount due the taxpayer shall be ascertained before the allowance is made.

The *Girard Trust Company Case* establishes another point with respect to when a credit is allowed. Where, as in that case, part of the overpayment is applicable as a credit against other taxes and part is refundable, the amount of the refund, being simply the balance of the overpayment remaining after the amount of the

credit has been determined by the Commissioner,[1] becomes fixed the instant that determination is made.

If, then, the amount of the refund in the *Girard Trust Company Case* was not fixed finally by competent authority until the Commissioner approved the report of the Collector it must have been because until that time the amount of the credit had not been fixed finally by competent authority. Therefore, in deciding when the amount of the refund in that case was fixed finally by competent authority the Court necessarily decided also that the amount of the credit was fixed finally by competent authority at the same time. And the Circuit Court of Appeals in the *Boston Buick Company* and *Iron Cap Copper Company Cases* so held, saying:

> "While it is true that the issue involved in the Girard Trust Company Case related only to the date of the allowance of a refund, the court, though by way of *dictum;* as it may be argued, also as definitely fixed the time of the allowance of credits. Its *dictum* as to the time of allowance of credits was, we think, an in-

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[1] Section 252 of the Revenue Act of 1918 provided: "That if, upon examination of any return of income * * * it appears than an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any *balance of such excess shall* be immediately refunded to the taxpayer * * *." [Italics ours.] This provision was reenacted without material change in the Revenue Act of 1921, § 252, in the Revenue Act of 1924, § 281, the Revenue Act of 1926, § 284, and the Revenue Act of 1928, § 322.

> evitable conclusion from its finding as to the time of allowance of a refund, since the amount to be refunded is absolutely determined when the credits are allowed." (No. 42, Rec. 22; 35 F., 2d, 562.)

Thus, the *Girard Trust Company Case* is not only conclusive of the proposition that a claim for credit, like a claim for refund, is not allowed until the amount is fixed finally by the Commissioner, but also of the proposition that where, as in the present case, part of the overpayment is applicable as a credit and part is refundable, the allowance of the credit and the allowance of the refund necessarily take place at the same time because the respective amounts are fixed finally at the same time.

Moreover, the Government presented the case on the theory that there is no difference between a claim for refund and a claim for credit from the standpoint of what constitutes allowance. Thus, contending for the date of the Commissioner's approval of the first schedule as the date of allowance, the Solicitor General's brief stated:

> "The right to refund or *credit* * * * was thus fixed and determined. * * * Thereafter it was only a routine matter to determine how much the claimant should receive in cash and how much by way of credit. This, of course, takes time if the interests of the Government are to be fully protected. Whichever it may be, the total of principal and interest received by the claimant is the same, and the date of the allowance of the claim, that is, the date of adjudication of his right to *credit* or refund, remains the date of the approval of the original schedule." (Sup. Ct., Oct. Term 1925, No. 137, *Girard Trust Co.*

v. *United States*, Brief for United States, pp. 13-14.) [Italics ours.]

And after the case was decided, fixing a later date as the date of allowance, namely, the date of the Commissioner's approval of the Schedule of Refunds and Credits, the Treasury Department at first treated the decision as applicable to claims for refund and claims for credit alike (T. D. 3850, head-note 1, Cum. Bul. V-1, p. 354, reproduced below[1]), just as it had formerly treated the date on which the Commissioner signed the Schedule of Overassessments as the date of allowance of claims for refund and claims for credit alike.[2]

Again, in *Blair, Comr.* v. *United States ex rel. Birkenstock*, 6 F. (2d) 679, affirmed by this Court, 271 U. S. 348, 350, 70 L. ed. 983, 984, on the authority of the *Girard Trust Company Case*, the brief for the Government, replying to a contention by the taxpayer that there might be a difference between credits and refunds as regards the date of allowance, observed:

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[1] "Under Sections 250 (b), 252, and 1324 (a) of the Revenue Act of 1921, the *date of allowance* to which interest is payable on *credits* and refunds is the date of final approval by the Commissioner and not the date when the Commissioner first determines that an overassessment should be made and transmits the schedule to the collector and not the date of final payment." [Italics ours.]

[2] Thus, Regulations 62, Art. 1040, provided: "A claim for refund *or credit* is allowed within the meaning of the statute when the Commissioner approves the schedule in whole or in part, for transmission to the proper accounting officer, for *credit* or refund." [Italics ours.] Regulations 65, Art. 1371, contained the same provision.

> "Under the contention of counsel for the petitioners the schedule sent to the Collector is an allowance in the case of a credit, but is not an allowance in the case of a refund. A single word in an Act cannot have one meaning when applied to one set of facts and another meaning when applied to another set of facts; *the word 'allowance' cannot refer to one action of the Commissioner when applied to a credit and to another action when applied to a refund.*" (Ct. App. D. C., Jan. Term 1925, No. 4246, Br. for Appellant p. 23.) [Italics ours.]

These passages from the Government's briefs in prior cases are quoted not, of course, merely to show inconsistencies in argument, but to show that it was the understanding of law officers and Treasury officers alike that claims for credit and claims for refund stand on the same footing as regards what constitutes allowance.

After regretting in the Court below the decision in the *Girard Trust Company Case,*[1] the Government now says that that decision supports its position that a credit is allowed when the Commissioner signs the Schedule of Overassessments.

The argument is that the *Girard Trust Company Case* "construed the word 'allowance' involved here to mean 'authorization,' " and decided that the refund

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[1] "The difficulty in this case seems to have arisen by reason of the language in the *Girard Trust Company Case.* It is submitted that if the Supreme Court had fully appreciated in that case how the *rule adopted* would affect credits and involve the whole subject in confusion, a different result might have been obtained." (Govt. Br., Court of Claims, *Swift and Co.* v. *U. S.,* Motion for New Trial, page 10.) [Italics ours.]

was allowed when the Commissioner signed the authorization to the Disbursing Clerk to make payment; and that by analogy "a credit is allowed when the Commissioner gives the direction to the Collector to make the credit." (Nos. 42, 43, Govt. Br. 22, 25-26, 29-32.)

This argument concedes that the principle of the decision in the *Girard Trust Company Case* is controlling as to what constitutes the allowance of a claim for credit as well as a claim for refund, so the issue narrows down to what that decision was.

It was *not* the authorization to the Disbursing Clerk to make payment that constituted the allowance of a claim for refund under that decision. The ground of the decision was that a claim for refund is allowed when the amount is fixed finally by competent authority, namely, the Commissioner of Internal Revenue, and that that takes place, under the course of business in the Commissioner's office, when the latter approves the Collector's report on the Schedule of Refunds and Credits. "This, we think," quoting from the opinion, "is the real date of allowance." "Until that time the exact amount of the refund is not fixed finally by competent authority." (*Ante*, 13-14.)

By what means the Commissioner manifests his approval, whether by signing a notice to the Disbursing Clerk that payment may be made, or by some other appropriate act, is merely a question of form and has nothing to do with the principle of the decision. If he had signed the schedule over an inscription reading, "The amounts shown herein as due the respective taxpayers by way of credit or refund are hereby approved and allowed," there can be no doubt that this would have constituted an award or allowance, so complete, indeed, that suit could be brought upon it if payment

were refused. (Compare *United States* v. *Kaufman*, 96 U. S. 567, 24 L. ed. 792; *United States* v. *Savings Bank*, 104 U. S. 728, 26 L. ed. 908; *United States* v. *City of Louisville*, 169 U. S. 249, 42 L. ed. 735.)

But assume that the ground of decision in the *Girard Trust Company Case* was that the Commissioner's notice to the Disbursing Clerk that payment might be made constituted the allowance of the refund. At the time of that notice the amount of the refund had been fixed finally by the Commissioner. Similarly, under the reasoning of the *Girard Trust Company Case*, before any authorization from the Commissioner to the Collector to enter a credit in the taxpayer's account could take effect as the allowance of a credit the amount of the credit would have to be fixed finally by the Commissioner. (*Ante*, 13-14.)

2. THE CONTENTION THAT THE COMMISSIONER'S APPROVAL OF THE SCHEDULE OF REFUNDS AND CREDITS RELATED ONLY TO REFUNDS.

It is contended that the signing by the Commissioner of the Schedule of Refunds and Credits could not constitute an allowance of a credit because what appeared immediately above his signature contained no reference to credits but was merely a notice to the Disbursing Clerk of the Treasury that the refunds found due might be paid. (No. 42, 43, Br. 16-17.)

This takes too literal a view of the matter. The schedule, as the Collector's certificate indicates, is a report of the amounts subject to credit as well as the amounts subject to refund, as shown by the Collector's books. Moreover, what the Commissioner subscribed was a notice to the Disbursing Clerk that not only the

refunds, but interest on the credits[1] might be paid, and his signature at that place, by necessary implication, if not expressly, constituted his approval of the findings of his subordinates as therein set forth with respect to overpayments made by the taxpayers named, and the amounts that should be credited and refunded, respectively.

This Court so construed the action of the Commissioner in the *Girard Trust Company Case*. Thus, referring to the Collector's report to the Commissioner showing "the amount which should be credited on taxes due and the amount to be refunded," the opinion states, "that this is examined by the Assistant Commissioner and then is delivered to the Commissioner, who makes it effective by his approval." (270 U. S. 171, 70 L. ed. 529.)

Likewise the Court of Claims:

> "* * * the defendant argues that when the commissioner signs the schedule of refunds and credits he only authorizes the disbursing clerk to pay the amount of tax shown to be refundable and the interest upon any refund or credit, and that this cannot be regarded as the taking of a credit. We think by this action the commissioner does more than merely authorize the payment of the refund and the interest. *He approves the report of the collector,* finally determines that there has been an overpayment, and makes effective a credit of that overpayment

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[1]The Government's brief states: "Neither in this certificate nor in the columns referred to is any mention made directly or indirectly of credits. (Nos. 42, 43, Br. 17.) Column 6 shows the interest due on both refunds *and credits.* (See Schedule of Refunds and Credits, Column 6, Govt. Br., Nos. 42, 43, Appendix B-2.)

against the additional tax for another year." (*Pottstown Iron Co.* v. *United States*, 69 Ct. Cl. 427, 434; No. 113, in this Court, Rec. 22.) [Italics ours.]

The Government's brief admits that the Commissioner, before signing the Schedule of Refunds and Credits, checks the Collector's adjustments thereon. (Nos. 42, 43, Br. 13.) In another place it is implied that this review is limited to refunds. But the findings show that the review included items reported by the Collector as subject to credit as well as those subject to refund. (No. 43, Rec. 26.)

Let it be supposed, however, that the signing by the Commissioner of the Schedule of Refunds and Credits constituted an allowance of refunds only. Allowance of credits would then have to be sought in some other act of the Commissioner subsequent to the receipt of the Collector's report.

It would have to be sought in some other act of the *Commissioner*, because he "is the final judge in the administrative branch of the Government to decide * * * that a refund or credit should be granted." (*Girard Trust Company Case, ante*, 11-12.) And the act must be *subsequent* to the Collector's report, because until then, as elsewhere shown, the Commissioner had neither the necessary information nor the authority to allow a credit. (*Post*, 29-30, 40-42.)

In other words, as stated by the Court of Claims in the *Pottstown Iron Company Case*, the credit in such case would be allowed "by whatever action the Commissioner takes in approving the report of the Collector." (69 Ct. Cl. 435; No. 113, Rec. 23.) One such act is the mailing by direction of the Commissioner to each taxpayer listed in the Schedule of Refunds and

Credits of a Certificate of Overassessment showing the amount of the overassessment abated, credited, or refunded. In the present case that was done September 26, 1923. (Finding XII, Rec. 16.)[1]

As supporting its contention that the signing by the Commissioner of the Schedule of Refunds and Credits did not constitute an allowance of a credit, the Government points to a finding in the *Iron Cap Copper Company Case* that where no refunds, and no credits on which interest must be paid, were listed on a Schedule of Refunds and Credits, the instructions were to

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[1]The Government quotes a portion of a finding in the *Iron Cap Copper Company Case,* No. 43, reading: "If the entire amount of the overassessment was either abated or credited the collector was instructed to mail the original certificate of overassessment to the taxpayer." (Nos. 42, 43, Br. 12.) The very next paragraph of the findings shows, however, that this procedure was soon found to be incomplete, and that "Collectors were accordingly instructed in any case in which any portion of an overassessment was to be either refunded *or credited* to return the original certificates of overassessment and to include the list of credit items on the subsidiary schedule." (No. 43, Rec. 23-24.)

Again it is stated that: "The signing of the certificate of overassessment by the Deputy Commissioner precedes the signing of the schedule of overassessments by the Commissioner. It is prepared and signed before the credit is allowed." (Nos. 42, 43, Br. 14.) But, at the time the certificate of overassessment is signed by the Deputy Commissioner the amounts to be abated, credited or refunded do not appear thereon, and could not, because, as the findings show, at that time the Commissioner's office did not know whether there would be any credit or refund at all, much less the amount. (No. 43, Rec. 28.)

file the schedule without its being signed by the Commissioner. (Nos. 42, 43, Br. 24.)[1]

Inasmuch as the statute has provided for interest on credits ever since the Schedule of Refunds and Credits came into use,[2] such a case would be very unusual, and as Mr. Justice Story said in *United States* v. *Dickson*, 15 Pet. 141, 164, 10 L. ed. 689, 698, "to put an extreme case is not a good test of the fair and just interpretation of any statute."

It will be time enough to decide what constitutes the allowance of a credit under such exceptional circumstances when the occasion arises and all the facts are presented. (Compare *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 731, 73 L. ed. 918, 928.)

It is sufficient now to repeat that it is the Commissioner's *approval* of the Collector's report which this Court held constituted allowance of a claim for credit or refund in the *Girard Trust Company Case* (*ante*, 13), and such approval might be indicated in other ways than by signing the Schedule of Refunds and Credits. As just stated, it might be indicated by the mailing of the Certificate of Overassessment notifying the taxpayer of the amount credited, or it might be implied from the course of business. (*Ante*, 25-26.)

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[1] No such finding was made in the *Boston Buick Company Case* nor in this case.

[2] Interest on refunds and credits was first provided for in the Revenue Act of 1921. The Schedule of Refunds and Credits came into use in February, 1923. (No. 56, Finding XIII, Rec. 16-17.)

3. THE CONTENTION THAT A CREDIT IS ALLOWED WHEN THE COMMISSIONER SIGNS THE SCHEDULE OF OVERASSESSMENTS.

The Government rests its case on the argument that a credit is allowed when the Commissioner signs the Schedule of Overassessments *because at that time the Commissioner makes his final decision that the overpayment shall be applied as a credit*, leaving, as it is said, only routine or ministerial acts to be done to make the credit effective. (Nos. 42, 43, Govt. Br. Points I, II, pp. 10, et seq.)[1]

The argument, if valid at all, would apply equally to refunds, and is in fact the very argument that was made in the *Girard Trust Company Case*, without success, to support the proposition that refunds and credits alike are allowed when the Commissioner signs the Schedule of Overassessments. Thus, referring to the signing of that schedule by the Commissioner, the Government's brief in that case stated: "The right to refund or credit * * * was thus fixed and determined. * * * Thereafter it was only a routine matter to determine how much the claimant should receive in cash and how much by way of credit." (*Ante*, 19.)

What the Government is really doing, therefore, is rearguing the *Girard Trust Company Case*.

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[1] The argument is summed up in the sentence: "* * * the allowance is a decision by competent authority that the credit *should* be made." (Ibid, 22.) [Italics ours.]

Waiving that, however, we answer:

a. *A determination that there has been an overassessment is not an allowance of a credit or refund.*

The fundamental error in the Government's position here, as it was in the *Girard Trust Company Case,* is its failure to distinguish between the determination of an overassessment and the allowance of a credit or refund.

The provision of the Schedule of Reductions of Tax Liability (later called Schedule of Overassessments) the signing of which by the Commissioner is alleged to have constituted an allowance of a *credit* in this case is the same provision the signing of which by the Commissioner was alleged to have constituted an allowance of a *refund* in the *Girard Trust Company Case,* and is set forth in the Special Findings of Fact, par. XI. (Rec. 14-15.)

It does not even purport to be an allowance by the Commissioner of either a credit or a refund. It is, as it says, an allowance of a "reduction of tax liability," a determination of an overassessment.

This distinction goes to the root of the matter. Deciding that there has been an overassessment is only the first step in the allowance of a credit or refund. The opinion in the *Girard Trust Company Case* expressly states that the proceedings leading up to the allowance of a credit as well as of a refund only "began" with that action. (270 U. S. 164-165, 70 L. ed. 526.)

Before the Commissioner can allow a credit or refund, it still has to be determined, *first,* what part of the over-*assessment,* if any, has been paid; *second,*

what unpaid assessments there are against the taxpayer for other years; and *third,* whether such unpaid assessments, if any, are legally collectible in whole or in part.

None of these things had been determined when the Commissioner signed the Schedule of Overassessments. At that time the Commissioner did not know, as the text of his authorization to the Collector shows (Finding XI, Rec. 14-15), whether or not there had been any overpayment out of which to allow a credit or refund, nor, if there had been an overpayment, whether there were any unpaid assessments for other years to be set off, if legally collectible; and he did not get that information until the Collector returned the Schedule of Overassessments together with a report showing the state of the taxpayer's account. As aptly stated by the Court of Claims:

> "The signing of the schedule of overassessments by the commissioner in the first instance and the making of a report by the collector to the commissioner as to the status of the taxpayer's accounts are steps preliminary to making a credit effective. In the matter of credits the collector of internal revenue is merely the bookkeeper who reports the condition of the taxpayer's accounts to the Commissioner of Internal Revenue for final action." (*Atlas Powder Co.* v. *United States,* 69 Ct. Cl. 558, 569.)

Not only, therefore, was a credit not allowed when the Commissioner signed and forwarded to the Collector the Schedule of Overassessments, but it was impossible for the Commissioner to have made the allowance at that time. To hold that he did would put him in the position of allowing a credit—of *adjudicating* that the United States is indebted to the taxpayer

(*United States* v. *Kaufman*, 96 U. S. 567, 570-571, 24 L. ed. 792, 793)—not only when he did not know how much to allow but when in many cases the Collector's report would show that the United States owed the taxpayer nothing.

The distinction between the determination of an overassessment and the allowance of a credit or refund was the foundation of the decision in the *Girard Trust Company Case.*

It was also the basis of the decisions below in the present cases:

> "The commissioner's decision that there has been an overassessment is one thing; the determination that there has been an overpayment is quite another. This cannot be determined by the commissioner until he is informed by the collector what part, if any, of the overassessment had been paid, and what part, if any, had been abated." (Op. Ct. Cl., No. 56, Rec. 20-21.)

> "The commissioner, who is the final arbiter in such matters, when he determines that there has been an overassessment has no knowledge of what the status of any taxpayer's account is, whether it will disclose that there has been an overpayment and, if so, whether there will be any sums due from the taxpayer for other periods to which the overpayments should be credited, or whether the overpayment must all be refunded." (Op. C. C. A., No. 42, Rec. 21; No. 43, Rec. 39.)

That the determination of an overassessment, or even an overpayment (which is a step farther along), does not carry with it the allowance of a credit or refund, but that the latter is a separate and distinct act, has likewise been decided by the Board of Tax Ap-

peals. The statute gives the Board jurisdiction in certain cases to determine whether a taxpayer has made an overpayment, and the question arose whether that carried with it jurisdiction to allow a credit or refund in those cases. The Board held not, saying:

> "*It would seem unnecessary to point out the distinction between a determination that the taxpayer has made an overpayment of tax and a determination that the taxpayer is entitled to a credit or to a refund.* The statute grants the Board jurisdiction to determine that the taxpayer has made an overpayment of tax in respect of the taxable year for which the Commissioner determined the deficiency, and then, so far as jurisdiction of the Board is concerned, becomes silent. The remainder of the provision is administrative, directing as it does that such overpayment shall be credited or refunded under certain circumstances. It gives the Board no jurisdiction to determine whether such circumstances exist." (Appeal of *Dickerman & Englis, Inc.*, 5 B. T. A. 633, 635.) [Italics ours.]

The Government relies especially upon the clauses in the Schedule of Overassessments authorizing the Collector to ascertain whether any part of the overassessment was an overpayment, and if so, to apply the overpayment as a credit on any taxes due for other periods and enter the balance as refundable. "This was the authorization which the Government contends was the *allowance* of a credit." (Nos. 42, 43, Br. 15.)

That could be so only by delegation to the *Collector* of authority to allow a credit, because, as we have seen, at the time the Commissioner signs this authorization he does not know whether or not there will be a credit. (*Ante*, 30.)

As this Court has decided (*Girard Trust Company Case, ante,* 11-12), and as the Government's brief states in another place (Nos. 42, 43, Br. 17-18), authority to allow both credits and refunds is vested exclusively in the Commissioner. And being judicial in nature (*United States* v. *Kaufman,* 96 U. S. 567, 570, 24 L. ed. 792, 793; *United States* v. *Real Estate Savings Bank,* 104 U. S. 728, 734, 26 L. ed. 908, 909; *United States* v. *Louisville,* 169 U. S. 249, 253, 42 L. ed. 735, 737), it cannot be delegated by the officer in whom the statute has vested it. (*Martin* v. *Mott,* 12 Wh. 19, 31-32, 6 L. ed. 537, 541; *The Floyd Acceptances,* 7 Wall. 666, 676-677, 19 L. ed. 169, 173-174; *Runkle* v. *United States,* 122 U. S. 543, 557, 30 L. ed. 1167, 1171; *In re Giles,* 21 Fed., 2d, 536, 537; *Birdsall* v. *Clark,* 73 N. Y. 73, 29 Amer. Rep. 105, 106; *Lewis* v. *Lewis,* 9 Mo. 183, 43 Amer. Decs. 540, 543-544; *Mechem on Public Officers,* §§ 567, 568.) Indeed, even where the act is ministerial or executive in its nature, if, as here, the law expressly requires it to be done by a particular officer it cannot be delegated to another. (35 Op. A. G. 15, 21; *Mechem on Public Officers,* §568.)[1]

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[1]Of course, the Commissioner could delegate to a subordinate the business of ascertaining from the taxpayer's accounts what part of the overassessment was an overpayment, and, if any, how much should be credited and how much refunded. But that is a very different matter from delegating to the subordinate authority to make his findings effective as an award or allowance. That requires the action of the Commissioner himself, as held in the *Girard Trust Company Case.* (*Ante,* 11-12.)

Compare cases like *Guarantee Co.* v. *Mechanics Bank & Trust Co.,* 173 U. S. 582, 43 L. ed. 818, holding

Be that as it may, these clauses, which directed the Collector to ascertain and enter on the taxpayer's account not only the amount of the overpayment applicable as a credit but also the amount refundable,[1] were considered in the *Girard Trust Company Case*. If effective as an allowance of a claim for credit they would be equally effective as an allowance of a claim for refund. This Court, however, as we have seen, treated the entries made by the Collector pursuant thereto not as entries of credits or refunds which had

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that a judgment of a court for money or money's worth is not final until the amount is fixed *by the court*. In that case the Bank brought suit against the Guarantee Company to recover an amount alleged to be due under two bonds insuring the Bank against loss on account of the fraudulent acts of one of its officers, Schardt by name. The Guarantee Company denied liability. The lower court adjudged that it *was* liable to the extent of the penalty of each bond, with interest, less the amount of "collections realized on assets or collaterals turned over to the Bank by Schardt to reimburse it," and a Master was appointed to ascertain and report the amount of such collections. It was held this was *not* a final decision, because—"Notwithstanding the company's defenses were adjudged to be bad in law, it remained for the circuit court by proper orders to accomplish the object of the suit, namely, *to ascertain the amount* for which the plaintiff was entitled to judgment and execution." (173 U. S. 586, 43 L. ed. 820.) [Italics ours.]

[1] "The balance, if any, of the overpayment will be entered in Column 12 and placed in Column 4 of the subsidiary schedule referred to above, and an appropriate memorandum made upon the taxpayer's account." (Nos. 42, 43, Rec. 6; No. 56, Finding XI, Rec. 14.) The Government's brief quotes only the clause relating to credits. (Nos. 42, 43, Br. 15.)

been finally allowed, but as provisional or interlocutory entries—as findings of "the amount which *should* be credited on taxes due and the amount *to be* refunded," requiring the approval of the Commissioner to make them effective. (*Ante*, 13.)

Recognizing the fundamental conflict between this statement of the matter by this Court and its own position in the present cases, the Government questions the correctness of the Court's construction of the Commissioner's direction to the Collector in the Schedule of Overassessments and the Collector's action thereunder, saying in its brief in the Circuit Court of Appeals in the *Iron Cap Copper Company Case:*

> "This is an incorrect statement for the reason that the collector does not report the amount that 'should' be credited and refunded." (P. 53.)[1]

To support this assertion the Government quotes the language of the Collector's certificate on the Schedule of Overassessments that "the amounts indicated *have been applied* as abatements and credits." (Nos. 42, 43, Govt. Br. 31.) The certificate also stated that

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[1]The challenge is softened in the Government's brief here so as to read: "This is not a correct statement of the practice shown to be in effect in the instant cases, for the reason that the Collector does not report the amount that 'should' be credited and refunded." (Nos. 42, 43, Br. 31.) This comes to exactly the same thing because the directions from the Commissioner to the Collector in the Schedule of Overassessments in the *Girard Trust Company Case* were the same as in the instant cases, and as the Government's brief in Nos. 42 and 43 itself shows (p. 31), the Collector's report pursuant to these directions was word for word the same.

"the amounts refundable *have been determined.*" (*Ibid.*)

The short answer is that the statement represents this Court's judgment of the effect of the language used and the acts done by the Commissioner and the Collector, respectively, and was the only possible construction consistent with the Court's conclusion that under the statute there could be no allowance of a claim for refund or credit until the amount to be allowed had been fixed finally by the Commissioner.

Moreover, the language of the Collector's certificate on the Schedule of Overassessments must be read along with that of the certificate on the Schedule of Refunds and Credits, which goes to the Commissioner at the same time that the Schedule of Overassessments is returned.

The certificate on the Schedule of Refunds and Credits, which was on a form prepared by the Commissioner, refers to the entries made by the Collector at this time as items that "*appeared* for refund or credit,"[1] and proceeds, "An examination of the ac-

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[1] The entire sentence reads: "The items hereon are relisted as they appeared for refund or credit on an original schedule (bearing the same number) of overassessments and related claims, if any, heretofore approved and allowed by the Commissioner of Internal Revenue." (Nos. 42, 43, Govt. Br., Appendix B-2.) As shown below (*post*, 37-38, foot-note 1), no items "appeared for refund or credit" when the Schedule of Overassessments left the hands of the Commissioner. Necessarily, therefore, the items referred to must be those entered by the Collector on the Schedule of Overassessments and certified to the Commissioner on the Schedule of Refunds and Credits as items "subject to refund or credit."

counts of the several taxpayers named disclosed such items to be the portions of such previously allowed overassessments or reductions of tax liability *subject* to refund or credit" (Nos. 42, 43, Govt. Br. Appendix B-2), plainly indicating that these entries required the approval of the Commissioner to make them effective.

In construing an act or document or a series of acts or documents their whole purport must be taken into consideration, without giving too much weight to "any specific phrase," and regardless of "minutiæ of expression." (*United States* v. *New York Central R. Co.*, 279 U. S. 73, 79, 73 L. ed. 619, 621.)[1]

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[1]How impossible it is to take literally all the language of these printed forms is shown by a paragraph in the Commissioner's authorization to the Collector on the Schedule of Overassessments, reading: "The amounts listed in Column 4 as overassessments (or reductions of tax liability), and the related claims, if any, are allowed in the respective amounts indicated by the 'Certificates of Overassessment' or 'Notices of Adjustment of Claim for Abatement' attached thereto." (No. 42, Rec. 6; No. 43, Rec. 12.) At that stage of the proceedings, however, the amounts to be allowed on the claims for refund or credit had not been ascertained, and the Certificate of Overassessment showed only the amount of the overassessment as found by the Commissioner. (No. 56, Finding XI, Rec. p. 14; Finding XII, Rec. p. 16.) It was not known then whether the taxpayer was entitled to any refund or credit at all, much less the amounts to be allowed. (*Ante*, 30.) Not until after the Collector had received the Schedule of Overassessments and had ascertained from an examination of the taxpayer's account whether any part of the overassessment was an overpayment, and, if any, how much should be credited on unpaid taxes for other years and how much refunded, were

In *Stotesbury* v. *United States*, 146 U. S. 196, 36 L. ed. 940, the Commissioner of Internal Revenue had signed a schedule of claims for the refunding of erroneously collected taxes at the foot of a certificate reading:

> "I hereby certify that the foregoing claims for the refunding of taxes erroneously assessed and paid have been examined *and allowed*, and are transmitted to the Secretary of the Treasury for his consideration and advisement." (146 U. S. 196, 36 L. ed. 941.) [Italics ours.]

And the question was whether this constituted a final allowance of the claims.

Conceding that "the power of final decision is vested in the Commissioner, and that there is no appeal from him to the Secretary of the Treasury," and that the only effect of transmitting the schedule to the latter was to afford him an opportunity to give advice if he desired (146 U. S. 200, 36 L. ed. 942), the Court nevertheless held that the sending of the schedule to the Secretary even for this limited purpose indicated that the Commissioner had made no final decision though the certificate signed by him stated that the claims *have been allowed.*

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the amounts to be refunded and credited, respectively, entered on either the Schedule of Overassessments or the Certificate of Overassessment. (No. 56, Findings XI, XII, Rec. 15, 16.)

Again, the Certificate of Overassessment informs the taxpayer that, "The amount of the overassessment *will be* abated, credited or refunded as indicated below." (No. 43, Rec. 14.) Yet at the time that certificate goes to the taxpayer the credit or refund had already been allowed in any possible view of the matter

Even less could the signing by the Commissioner of the Schedule of Overassessments have been a final allowance of the claim for credit in the present case, because not only was the schedule transmitted to another officer for a report, but until that report was received the Commissioner did not know what amount to allow as a credit, or whether the taxpayer was entitled to any credit at all for that matter.

The Government's brief states that the "schedule of overassessments is the only word with reference to credits which passes from the Commissioner to the Collector." (Nos. 42, 43, Br. 19.)

On the contrary, *after* both that schedule and the Schedule of Refunds and Credits had been signed by the Commissioner, the Certificates of Overassessment addressed to the respective taxpayers, and upon which now appeared the amounts allowed by the Commissioner by way of credit or refund, "were dated and returned to the Collector for mailing to the taxpayers." (No. 56, Finding XI, Rec. 14-15.)

Certainly, this was notice to the Collector, as it was to the taxpayer, that a credit or refund, or both, had been allowed. Indeed, it is fair to assume that the very purpose of this procedure was to notify the Collector of the Commissioner's final action in the matter; otherwise the natural course would have been for the Commissioner's office to forward the Certificate of Overassessment directly to the taxpayer.

*b. A credit can not be allowed until the amount is fixed finally by the Commissioner, and that had not been done at the time the Schedule of Overassessments was signed.*

As already shown, there can be no allowance by the Commissioner of Internal Revenue of either a credit

or a refund until the amount has been fixed finally by him. (*Ante*, 13-19.)

At the time the Commissioner signed the Schedule of Overassessments he not only had not fixed the amount of the credit, but, as just seen, he did not even know whether there had been any overpayment out of which to allow a credit, or whether there were any unpaid assessments against which to credit an overpayment if there had been one. (*Ante*, 30.)

It is argued that even in the case of refunds, under the practice prevailing since January 1927, the Commissioner has no information as to the amount to be refunded at the time he purports to make the allowance. (Nos. 42, 43, Br. 19.)

If this be so it is a defiance of this Court's decision in the *Girard Trust Company Case* that a refund is not allowed within the meaning of the statute until the amount is fixed finally by competent authority. True, the Revenue Act of 1926, § 1116 (*b*) (2), provided, on the suggestion of the Treasury, that refunds should be regarded as allowed on the date when the Schedule of Overassessments was signed. But in the very next Revenue Act, that of 1928, § 614(c), this provision was repealed, leaving the law as this Court had declared it in the *Girard Trust Company Case* in full force.

*c. The Commissioner had no authority to allow a credit at the time he signed the Schedule of Overassessments.*

Prior to the passage of the Revenue Act of 1918 the authority now vested in the Commissioner to credit an overpayment of taxes for one year on taxes due and unpaid for another year did not exist. (A. R. M. 123, Cum. Bul. No. 4, pp. 330-332; L. O. 1106, Cum. Bul. 1-2, p. 221; S. M. 4170, Cum. Bul. IV-2, pp. 102, 103.)

Section 252 of that Act granted such authority in the following terms:

> "That if, upon examination of any return of income * * * *it appears* that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer * * *." [Italics ours.]

This provision was reenacted verbatim in the Revenue Act of 1921, § 252, and without material change in the Revenue Act of 1924, § 281, the Revenue Act of 1926, § 284, and the Revenue Act of 1928, § 322. There is no other law on the subject. (L. O. 1106, Cum. Bul. I-2, p. 221.)

Thus, no authority has ever existed under the law to allow a credit *until* "it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due," or in the language of the later acts, *until* it appears that "there has been an overpayment of any income, war-profits or excess-profits tax."

"When a statute limits a thing to be done in a particular mode it includes the negative of any other mode." (*Botany Worsted Mills* v. *United States*, 278 U. S. 282, 289, 73 L. ed. 379, 385. See also *Farrell* v. *United States*, 99 U. S. 221, 224, 25 L. ed. 321, 322.)

This limitation upon the authority to allow a credit was early recognized by the Bureau of Internal Rev-

enue itself. Opinion 957 of the Solicitor of Internal Revenue held:

> "* * * It [Revenue Act of 1918, § 252] provides only for the allowance of the credit when 'it *appears* that an amount of income, war profits, or excess profits tax has been paid in excess of that properly due.' * * * It is only the amount of the excess which can be credited against assessments upon another return and the amount of the excess can only be known when the merits of the claim for refund have been determined. It is clear then that the word 'appears' as used in this section is equivalent to '*has been ascertained.*'" (Cum. Bul. No. 1, pp. 256, 257.) [Italics ours.]

Now, at the time the Commissioner, in whom alone authority to allow credits is vested, first decided that there had been an overassessment and signed and forwarded to the Collector a schedule thereof, it had *not* been ascertained that the amount of tax paid was in excess of that properly due. As already seen (*ante*, 29-39), the Commissioner's decision that there had been an over-*assessment* was not a decision that there had been an over*payment*. That depended upon what part, if any, of the tax assessed had been paid, and what part, if any, had been abated. In other words, it depended upon the state of the taxpayer's account, and that account was kept by the Collector. (*Girard Trust Company Case*, 270 U. S. 171, 70 L. ed. 529.)

It follows that until the Schedule of Overassessments was returned to the Commissioner with the Collector's report showing whether there had been an overpayment, and if so, the amount of it, the Commissioner *had no authority* under the law to allow a credit.

4. THE CONTENTION THAT THE PRACTICE OF THE BUREAU OF INTERNAL REVENUE HAS BEEN TO TREAT A CREDIT AS ALLOWED WHEN THE COMMISSIONER SIGNS THE SCHEDULE OF OVERASSESSMENTS.

The Government maintains that the Bureau of Internal Revenue has consistently taken the position that a credit is allowed when the Commissioner signs the Schedule of Overassessments, and that Congress has impliedly ratified this administrative construction by subsequently reenacting the statute without substantial change. (Nos. 42, 43, Br. 33-36.)

The reference is to part of Article 1040 of Regulations 62 promulgated under the Revenue Act of 1921, reading:

> "A claim for refund or credit is allowed within the meaning of the statute when the Commissioner approves the schedule in whole or in part for transmission to the proper accounting officer, for credit or refund." (Nos. 42, 43, Br. 35.)

That, however, is the identical article of the regulations which was invoked in the *Girard Trust Company Case* as determinative of the date of allowance of a refund, and was rejected because inconsistent with the law. (270 U. S. 169, 171, 70 L. ed. 528, 529; *ante*, 12.) To quote again what the Court said:

> "We cannot concur, however, in the view of the Treasury Department that the date of the allowance of the claim as intended by the statute is the date when the Commissioner first decides that there has been an overassessment and sends upon a proper form his decision to the collector of internal revenue, * * *." (270 U. S. 170-171, 70 L. ed. 529.)

If, as we have sought to show, the law as declared by this Court requires that the amount be fixed finally by the Commissioner before a claim for credit as well as a claim for refund can be deemed allowed, no practice of the Bureau of Internal Revenue could make the allowance of a credit, any more than the allowance of a refund, take place when the Commissioner signs the Schedule of Overassessments, because at that time the Commissioner, so far from having fixed the amount of the credit, does not even know that there will be one. (*Ante*, 30.)

But assume the administrative construction relied upon had not already been rejected by this Court. The rule that the reenactment without substantial change of a statute previously construed by the appropriate administrative department constitutes a legislative approval of the administrative construction is applicable only under the following conditions: (a) the statute must be ambiguous (*Iselin* v. *United States*, 270 U. S. 245, 251, 70 L. ed. 566, 570; *United States* v. *Missouri P. R. Co.*, 278 U. S. 269, 280, 73 L. ed. 322, 377-378); (b) it must be "capable of the construction given to it" (*Dollar Savings Bank* v. *United States*, 19 Wall. 227, 237, 22 L. ed. 80, 81), i. e., the administrative construction must not be "plainly erroneous" (*United States* v. *Missouri P. R. Co.*, 278 U. S. 280, 73 L. ed. 377), but must be "reasonable and do no violence to the letter or spirit of the provisions construed" (*Brewster* v. *Gage*, 280 U. S. 336, 74 L. ed. 462); and (c) the administrative construction must have been long-continued and consistent (*Iselin* v. *United States*, 270 U. S. 251, 70 L. ed. 570).

Not one of these conditions is met in the present case, much less all.

*a. The statute is not ambiguous.*—At the time the words in controversy, "allowance of a claim for the refund of or credit for internal revenue taxes," were used in § 1324 (a) of the Revenue Act of 1921 they had acquired a clear and settled meaning. This Court itself, as before noted (*ante*, 15), had defined the allowance of such a claim by the Commissioner of Internal Revenue as "the equivalent of an account stated between private parties" (*United States* v. *Kaufman*, 96 U. S. 567, 570, 24 L. ed. 792, 793), or "a statement of accounts by one having authority for that purpose under an act of Congress" (*United States* v. *Savings Bank*, 104 U. S. 728, 734, 26 L. ed. 908, 909; *United States* v. *City of Louisville*, 169 U. S. 249, 253, 42 L. ed. 735, 737); which necessarily implies a determination by the Commissioner of the amount due the tapayer. Even if any other reasonable meaning could be ascribed to the words it must be presumed, under a familiar rule, that Congress used them in the Revenue Act of 1921 in the sense adopted by this Court in construing earlier statutes in *pari materia*.

*b. The statute is not capable of the construction given to it by Article 1040 of Regulations 62.*—As we have shown, when the Commissioner signed the Schedule of Overassessments he did not even know whether there had been any over*payment* out of which to allow a credit, or, if there had been an overpayment, whether there were any unpaid assessments against which to credit it, so that under the construction of the statute expressed in Article 1040 of Regulations 62 the Commissioner would be put in the impossible position of allowing a credit not only when he does not know what amount to allow, but when the collector's report in some cases would show no overpayment at all and

therefore nothing to credit and in others no unpaid assessments against which to credit any overpayment if there had been one. (*Ante*, 30-31, 40.)

When administrative practice is inconsistent with a reasonable interpretation of the law neither long usage nor considerations of convenience can save it.

In *United States* v. *Dickson*, 15 Pet. 141, 10 L. ed. 689, cited with approval in *United States* v. *Missouri P. R. Co.*, 278 U. S. 269, 280, 73 L. ed. 322, 378, the controversy was over the meaning of the phrase "any one year" in the Act of April 20, 1818, providing for the compensation of receivers of public moneys. The claimant contended that it meant any year beginning with the date of his commission. The Government contended that it meant any calendar year, the calendar year then being the fiscal year, and had been so construed in practice ever since the act was passed—a period of more than twenty years. And stressing, as in the present case, the alleged ill consequences of departing from the administrative practice, the argument proceeded—that all the public accounts, including those of receivers of public money, were kept on the calendar year basis; "that if any other mode of keeping the accounts were adopted, it would introduce delays, embarrassment and confusion into the department, and take away the only adequate means of ascertaining from time to time the exact financial state thereof, as to debts, and credits, and disbursements, which is so essential to the public security, and regular operations of the Government;" and that "in order to give full effect to this system it is necessary, in all laws of this character, to construe the year to mean the fiscal year." (15 Pet. 160, 10 L. ed. 697.) But, though it had been consistently followed for twenty years, this Court rejected the administrative construction because not in

accordance with the law, saying through Mr. Justice Story:

> "The construction so given by the Treasury Department to any law affecting its arrangements and concerns, is certainly entitled to great respect. Still, however, if it is not in conformity to the true intendment and provisions of the law, it cannot be permitted to conclude the judgment of a court of justice. The construction given to the laws by any department of the executive government, is necessarily exparte, without the benefit of an opposing argument, in a suit where the very matter is in controversy; * * *. * * * it is not to be forgotten that ours is a government of laws and not of men, and that the judicial department has imposed upon it by the Constitution the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it." (15 Pet. 161-162, 10 L. ed. 697.)

*c. The administrative construction has been neither long-continued nor consistent.*—Article 1040 of Regulations 62 had not been in force two years when it was challenged in the *Girard Trust Company Case* (instituted August 11, 1923), with the result already stated. If, as the Government states (Nos. 42, 43, Br. 34), "Many cases have been closed in accordance with this departmental regulation," that has been done in the face of this Court's decision overruling the regulation on grounds applicable to refunds and credits alike. (*Ante*, 11-13.)

Nor has the administrative construction been consistent.

On the one hand Article 1040 of Regulations 62 provided, as stated, that a claim for refund or credit is allowed within the meaning of the statute when the Commissioner approves the Schedule of Overassessments. (*Ante*, 43.)

But turning to that schedule, it will be seen that it did not even purport to be an allowance by the Commissioner of a credit or refund. It was merely an allowance of a "reduction of tax liability"—a determination of an overassessment—which is but the first step in the allowance of a credit or refund. (*Ante*, 29.)

Again, under the early practice, as found in the *Iron Cap Copper Company Case*, "before the Commissioner could prepare a Schedule of Credits • • •, he had to have information from the Collector's office as to what taxes were due and how much the taxpayer had paid." (No. 43, Rec. 28.) This is entirely inconsistent with the position that a claim for credit is allowed when the Schedule of Overassessments is signed because at that time the Commissioner had no information as to taxes paid or taxes owing by the claimant. (*Ante*, 29-30, 40.)

Similarly, Solicitor's Opinion 106 held—

> "that where the allowance of a credit as provided in section 252 of the Revenue Act of 1918 is being considered by the Commissioner, the credit is made or allowed only when the Commissioner signs and forwards to the collector a formal statement or direction or assessment list *showing the amount of the tax to be collected over and above the amount of the credit.*" (Cum. Bul. No. 4, pp. 339, 341.) [Italics ours.]

Again, Treasury Decision 3260 stated:

> "Upon receipt of such schedules [Schedules of Overassessments] the several collectors of

> internal revenue shall immediately check the items thereon against the accounts of the several taxpayers concerned and determine whether the several amounts of overassessments *should* be abated, refunded, or credited against assessments remaining unpaid." (Cum. Bul. No. 5, p. 243, 244.) [Italics ours.]

If the Commissioner had considered a credit as allowed when he signed the Schedule of Overassessments, certainly he would not have instructed the Collector upon receipt of the schedule, to determine "whether the several amounts of overassessments *should* be abated, refunded or credited."

Again, in the Schedule of Refunds and Credits on which the Collector made his report to the Commissioner after receiving the Schedule of Overassessments and examining the taxpayer's account, the amounts set forth as due the taxpayer by way of credit or refund were described in the certificate of the Collector as items that "*appeared* for refund or credit," and as items "*subject* to refund or credit." (Govt. Br. Nos. 42, 43, Appendix B-2.)

Again, the Certificate of Overassessment, which was not dated nor forwarded to the taxpayer until after the Schedule of Overassessments had been signed by the Commissioner and transmitted to the Collector and returned, states:

> "The amount of the overassessment *will* be applied as follows: * * * if the tax has been paid, the amount of the overpayment *will* either be credited * * *, etc., etc." (No. 43, Rec. 14.)

Again, Treasury Decision 3850, head-note 1, stated:

> "Under Sections 250 (b), 252, and 1324 (a) of the Revenue Act of 1921, the *date of allowance* to which interest is payable on *credits* and

> refunds is the date of final approval by the Commissioner and *not* the date when the Commissioner first determines that an overassessment should be made and transmits the schedule to the collector and not the date of final payment." (Cum. Bul. V-1, p. 354.) [Italics ours.]

After remaining in force about five months Treasury Decision 3850 was revoked by Treasury Decision 3919. (Cum. Bul. V-2, p. 209.)

Thus, far from being clear or consistent, the administrative view as to when a credit is allowed within the meaning of the statute has always been badly confused.

It is argued further that Congress not only impliedly ratified the administrative practice embodied in Article 1040 of Regulations 62 by reenacting the statute without substantial change, but that in the Revenue Act of 1926 "it gave express approval of this practice after it was aware that in the *Girard Trust Company Case* the practice and interpretation of the Bureau had been challenged." The reference is to § 1116 (b) (2) of the Revenue Act of 1926, providing that "the term 'date of the allowance of the refund' means * * * the first date on which the Commissioner signs the schedule of overassessments in respect thereof." (Nos. 42, 43, Govt. Br. 36.)

This was not a ratification of the administrative construction of the law as it had previously stood. It was a *change in the law*, as the Government's brief elsewhere recognizes.[1]

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[1] "By § 1116 (b) (2) of that Act, Congress *changed the law* as stated by the Girard Trust Company Case, and declared that a refund was allowed when the Commissioner signed the Schedule of Overassessments." (Nos. 42, 43, Br. 27.) [Italics ours.]

But it is of no importance here which it was, as it was repealed in the very next revenue act, that of 1928, § 614 (c).

The Government explains the repeal by saying that the date of allowance of a refund had lost its significance because by a change in the law interest on refunds was no longer to be computed to the date of allowance. (Nos. 42, 43, Br. 36.) Why the provision was repealed is immaterial, but an equally plausible reason is that Congress had had brought to its attention the impossibility of the Commissioner's allowing a refund at a time when he not only did not know how much to allow but did not know whether any refund at all was due.

5. THE CONTENTION THAT ONLY MINISTERIAL ACTS REMAINED TO BE DONE AFTER THE COMMISSIONER SIGNED THE SCHEDULE OF OVERASSESSMENTS.

With respect to the argument that the date of allowance of the credit must be the date of the Commissioner's decision that there had been an overassessment because after that nothing remained to be done except routine or ministerial acts (Nos. 42, 43, Br. 8, 24), it would be sufficient to reply, *first*, that regardless of the character of the acts remaining to be done, there can be no final allowance of a credit until the amount has been determined by the officer authorized by law to make the allowance (*ante*, 13-19), and *second*, that the same argument was made, without success, as regards both credits and refunds, in the *Girard Trust Company Case*.[1]

[1] "Thereafter [i. e., after the Commissioner's decision that there had been an overassessment] it was only a routine matter to determine how much the claimant should receive in cash and how much by way of credit." (Sup. Ct., Oct. Term 1925, No. 137, Brief for United States, pp. 13-14.)

But the things remaining to be done after the Commissioner decides that there has been an overassessment, before a credit or refund is finally allowed, are *not* all routine or ministerial. Thus, before any part of an overpayment can properly be withheld as a credit against assessments for other years reported by the Collector as unpaid, the Commissioner must determine whether those unpaid assessments are legally collectible. (See Law Opinion 1095, Cum. Bul. I-1, p. 313.)[1]

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[1] The specific question there was whether an overpayment can be applied as a credit against an assessment which is not legally collectible because of the running of the statute of limitations. Holding that it cannot be, the opinion states:

"To adopt a contrary holding would result in the Government in many instances taking advantage of its own wrongdoing, as the section is mandatory and the Commissioner is required to apply an overpayment of taxes for one year to an underpayment for a different year. Thus, if pursuant to an additional assessment a tax is collected in an amount greater than thereafter found due and the taxpayer happened to owe a tax which could not be collected by assessment or suit, the Government having come into possession of the money would be required to keep it and apply it against such unenforceable claim.

* * * * * * *

"It is therefore held that an amount refundable under section 252 of the Revenue Act of 1921 can not be applied against a tax which can not be collected either by assessment or suit due to the running of the statute of limitations." (Pp. 314, 315.)

6. THE CONTENTION THAT A CREDIT TAKES EFFECT AS A PAYMENT WHEN THE COLLECTOR, AFTER RECEIVING THE SCHEDULE OF OVERASSESSMENTS, ENTERS ON HIS BOOKS THE AMOUNT SUBJECT TO CREDIT AS ASCERTAINED BY HIM AND CERTIFIED TO THE COMMISSIONER.

As has appeared, after the Collector received the Schedule of Overassessments he ascertained from his books whether any part of the overassessment had been paid, and if so how much of the overpayment was subject to refund or credit, as the case might be, and certified these amounts to the Commissioner on the Schedule of Refunds and Credits. (*Ante*, 30, 36-37.) The certificate reads: "An examination of the accounts of the several taxpayers named disclosed such items to be the portions of such previously allowed overassessments or reductions of tax liability *subject* to refund or credit." (Nos. 42, 43, Govt. Br. Appendix B-2.) [Italics ours.]

At or about the same time the Collector entered on his books the amounts so certified to the Commissioner as "subject to refund or credit," and the contention is that when he made those entries the credit was taken, i. e., became effective as a payment. (No. 56, Govt. Br. 7-11; No. 113, *Pottstown Iron Co.* v. *United States*, Govt. Br., 4-6.)[1]

But a credit cannot take effect as a payment before it is allowed by the Commissioner. And since it is not allowed until the Collector's report of the amount subject to credit has been approved by the Commissioner (*ante*, 13 *et seq.*), the entries in the Collector's books

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[1] "The Government contends that in each case the credit was taken and the tax paid when the Collector entered the credit on his records of the taxpayer's indebtedness." (No. 113, Govt. Br. 5.)

are necessarily only provisional until that time, and this Court so construed them in the *Girard Trust Company Case.* (*Ante,* 12-13.)

In *Peerless Paper Box Mfg. Co.* v. *Routzahn,* 22 F. (2d) 459 (N. D. Ohio), *Brady* v. *United States,* 24 F. (2d) 205 (D. Mass.), and *Boston Pressed Metal Co.* v. *United States,* 42 F. (2d) 312 (Ct. Cl.), cited in the Government's brief, the question when a credit is allowed or taken was not in issue.[1]

As for the Court of Claims, it has consistently held in a series of cases that a credit is taken when allowed, i. e., when the Commissioner approves the Collector's report on the Schedule of Refunds and Credits showing the amounts "subject to refund or credit." (*Pottstown Iron Co.* v. *United States,* 69 Ct. Cl. 427, 40 F. (2d) 142, now pending in this court as No. 113; *West Leechburg Steel Co.* v. *United States,* 69 Ct. Cl. 461, 40 F. (2d) 131; *Atlas Powder Co.* v. *United States,* 69 Ct. Cl. 558, 40 F. (2d) 136; *Andrews Steel Co.* v. *United States,* — Ct. Cl. —, 42 F. (2d) 573.)

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[1] Besides, in the *Peerless Paper Box Mfg. Co. Case,* which the *Brady Case* followed, the language of the opinion shows that the Court apparently understood that the entry of the amount of the credit by the Collector took place after the Commissioner had signed the Schedule of Refunds and Credits. Thus: "At the time the defendant collector applied the sum determined as overpayment for 1918 to the credit of the second additional assessment of 1917, he paid the accumulated interest thereon to the plaintiff." (P. 460.) Admittedly the check for interest upon amounts credited does not go to the Collector for delivery to the taxpayer until after the Schedule of Refunds and Credits has been signed by the Commissioner. (No. 56, Rec. 15-16.)

In the *Pottstown Iron Company Case,* now pending in this Court as No. 113, the Government contended in the Court of Claims that the credit was not taken "until plaintiff received the Certificates of Overassessment and the refund checks" (Govt. Br., Ct. Cl., p. 57),—which was not only after the Collector entered on his books the amount reported to the Commissioner as subject to credit, but after the Commissioner had approved the Collector's report by signing the Schedule of Refunds and Credits (*Ante,* 4-5.) And in the *West Leechburg Steel Company Case,* heard during the same term as the *Pottstown Iron Company Case* and decided on the same day, the Government likewise contended "that the credit was taken by plaintiff [taxpayer] when plaintiff [taxpayer] received the Certificate of Overassessment advising of the amount credited and the amount to be refunded, together with the refund checks," adding:

> "This contention is in accordance with the uniform practice in the Income Tax Unit."[1] (Govt. Br., Ct. Cl., p. 82.)

So that the contention now made—that the credit was taken when the Collector entered on his books the amount certified to the Commissioner as *subject* to credit—is not only contrary to that made in the Court below, but, according to the Government's own statement, contrary to the uniform practice of the Treasury Department.

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[1] Reg. 69, art. 1302, and Reg. 74, art. 1252, provide: "Overassessments and overpayments of income and profits taxes will be adjusted by means of Certificates of Overassessment." See also Reg. 62, art. 1031 (a), and Reg. 65, art. 1302.

## Point II.

**Where the tax is paid by the allowance of a credit the statutory period of four years from the date of payment of the tax within which to file claims for refund does not start running until notice of the allowance is received by the taxpayer, which in the present case was not earlier than September 26, 1923, the date of the Certificate of Overassessment.**

Treasury Regulations 62, Art. 1035, under the Revenue Act of 1921, then in force, expressly provided that "due notice will be given * * * the taxpayer of the action taken on the claim."

The taxpayer's first and only notice that a credit has been allowed is the Certificate of Overassessment[1] (Finding XI, Rec. 16), and that is not sent to him until after the Commissioner has received from the Collector and approved the Schedule of Refunds and Credits. (*Ibid.*) Until then the whole matter remains locked in the breast of the Commissioner. "The schedule of assessments which the Commissioner approves is not a record open to the public, but is an interdepartmental document, and the taxpayer apparently has no authoritative information as to the decision of the Commissioner except the prescribed notice by mail." (*Michel* v. *United States*, 37 F., 2d, 38, 39, C. C. A. 2d.)

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[1]As just noted (*ante*, 55), the regulations provide that "Overassessments and overpayments of income and profits taxes will be adjusted by means of Certificates of Overassessment."

Nor is there any limit to the time which may intervene between the signing of the Commissioner's authorization to the Collector on the Schedule of Overassessments, and the signing of the Schedule of Refunds and Credits, or between the signing of the latter and the mailing of the Certificate of Overassessment. All that is entirely within the control of the Commissioner. In the present case seven months elapsed between the signing of the Schedule of Overassessments and the signing of the Schedule of Refunds and Credits, and nearly a month more before the taxpayer was notified of the Commissioner's action by receipt of the Certificate of Overassessment on or about September 26, 1923.

Therefore, where payment of a tax is effected by crediting against it an overpayment for another year, unless the period of limitations for filing claims for refund does not begin to run until the taxpayer receives notice of the credit as provided by the regulations, the time would be running against him without his having any means of knowing it. In other words, by delaying notice to the taxpayer the Commissioner could cut down at will the statutory period of limitations. "It would require plain and compelling language to justify so incongruous a result * * *." (*Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348, 73 L. ed. 410, 415.)

While not expressly provided in the statute that where payment is by credit the period of limitations shall not begin to run until the taxpayer receives notice of the credit, "the statute of limitations may be suspended by causes not mentioned in the statute itself." (*Braun* v. *Sauerwein*, 10 Wall. 218, 222, 19 L. ed. 895, 897.)

Compare *Michel* v. *United States, ante,* where the Circuit Court of Appeals, 2nd Circuit, held that the period prescribed by Revised Statutes § 3226, as amended, within which to bring suit on a claim for refund, namely, two years from the disallowance of the claim, does not commence to run until the taxpayer has received notice of the disallowance as provided for by the statute. A like decision was made by the District Court, Northern Ohio, in *Mahoning Coal R. Co.* v. *United States,* 28 F. (2d) 917.

POINT III.

**Regardless of whether the claim for refund filed September 3, 1927, was in time, the original claim filed February 28, 1923, admittedly within the prescribed period,[1] was sufficient to satisfy the statutory condition precedent to bringing suit for the recovery of the illegally collected tax, but granting that it was not, it could be perfected by amendment as well after the expiration of the period of limitations as before, and was perfected by the claim filed September 3, 1927.**

1. Revised Statutes, § 3226, U. S. Code, Title 26, § 156, provides that no suit shall be maintained for the recovery of erroneously or illegally collected internal-revenue taxes

> "until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof."

The "provisions of law in that regard," so far as applicable in the present case, are § 252 of the Revenue

[1] Finding VII, Rec. 13.

Act of 1921 and § 284 (b) (1) of the Revenue Act of 1926, neither of which lays down any requirements as to the form or contents of such claims. Each provides merely that no refund or credit shall be allowed after a specified time (five years from the date when the return was due, or four years from the date the tax was paid),

> "unless before the expiration of such period a claim therefor is filed by the taxpayer."

The original claim for refund in this case was made out on the prescribed departmental form and stated a number of different grounds—all in short, informal language. The particular ground in question, reading, "Foreign Dividends Overstated" (Pet., Ex. A, Rec. 8, 9), while abbreviated like the rest, could mean only one thing—that dividends received from a foreign company or companies which were not a part of Swift and Company's taxable income for 1917 had been included as such in determining its tax liability for that year.[1]

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[1] The opinion of the Court of Claims is in error in stating (Rec. 18) that the original claim alleged "as a ground for the refund that the stock dividends in question should have been allocated to other years than 1917." As stated, the ground for refund alleged was that certain dividends received from foreign companies had been erroneously included in computing the taxpayer's income for 1917. True, one of the arguments in support of that ground was that the dividends had been specifically declared out of earnings for prior years. (Finding VIII, Rec. 13.) But that contention was no more apparent on the face of the claim than the contention now made that one of the dividends was a stock dividend.

This was a sufficient statement of the ground of claim to meet the condition of the statute that no refund or credit shall be allowed after five years from the date when the return was due, or four years from the time the tax was paid, as the case might be, "unless before the expiration of such period a claim therefor is filed by the taxpayer." (*Ante*, 59.)

While the statement was general, it was no more general than the statement of claim in a large class of actions at law.[1] Just as in those actions, the details of the claim could be supplied and were supplied in supplemental statements in the nature of bills of particulars.

True, Treasury regulations provide that claims for refund shall set forth "*all* the facts relied upon in support of the claim" (Reg. 62, art. 1036; Reg. 69, art. 1304); and from this it is argued that the claim here is insufficient to support the present suit because "it gave the Government officials no indication that a refund would be sought on the ground that a stock dividend was erroneously taxed." (Govt. Br. 13.)

But the Commissioner of Internal Revenue could waive the requirements of the regulations (*Tucker* v. *Alexander*, 265 U. S. 228, 231, 72 L. ed. 253, 256), and at the time this claim was filed it had become the settled practice to waive them, even to the extent of per-

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[1] In *indebitatus assumpsit*, "It was enough to allege the general nature of the indebtedness, as for goods sold, money lent, money paid at the defendant's request, money had and received to the plaintiff's use, work and labor at the defendant's request, or upon an account stated, and that the defendant being so indebted promised to pay. This was the origin of the common counts." (Ames Lectures on Legal History, pp. 153-154.)

mitting claims to be amended so as to assert new grounds for refund after the period of limitations had expired.[1]

In the present case, moreover, the Commissioner waived the requirements again when he took cognizance of the claim notwithstanding its generality (*Howbert* v. *Penrose* and *Penrose* v. *Howbert*, 38 F., 2d, 577, 580, C. C. A. 10th; *Lehigh & Wilkes Barre Coal Co.* v. *United States*, 38 F., 2d, 637, 638-639, Dist. Ct. N. D. Pa.), considering and overruling the theory or contention first advanced in support of it, namely, that the dividends in question should not have been included in Swift and Company's taxable income for 1917 because declared out of earnings for prior years. (Finding VIII, Rec. 13.)

Besides, the original claim for refund *did* give notice of the ground of claim asserted in the present suit, namely, an overpayment of income and excess profits taxes for 1917 caused by including as a part

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[1] In *Magnolia Petroleum Co.* v. *United States*, 63 Ct. Cl. 173, 188, the parties stipulated and the Court found that: "It had been for many years the consistent practice of the Bureau of Internal Revenue, where claims were filed within the statutory period, for taxpayers to amend their claims by asserting new grounds for refund and such amendments were accepted regardless of whether the statutory period within which claim might have been filed had expired or not. However, the amount claimed could not, under such practice, be increased by amendment. This unbroken practice of the bureau continued until partially modified by the action of the Commissioner of Internal Revenue by his letter to plaintiff, dated January 18, 1924, and also partially modified by Law Opinion 1116, issued May 26, 1924, Internal Revenue Cumulative Bulletin III-1, page 350."

of the taxpayer's income for that year a dividend which was not such. While a new theory as to why the dividend was not a part of the taxpayer's income for 1917 is now advanced, namely, that it was a stock dividend, a claim for refund is not required to give notice of all the possible legal theories or contentions that may be advanced in support of it, but only of the *ground* of the claim in the sense that a declaration or a complaint at law or in equity gives notice of the cause of action. There is a distinction between a new claim or cause of action and a new legal theory in support of the same claim or cause of action. (See *post*, 67-71.)

2. Granting that the original statement of claim was not sufficient of itself, and that its defects were not waived, it could be perfected by amendment as well after the expiration of the period of limitations as before, and was perfected by the claim filed September 3, 1927. (Pet., Ex. B, Rec. 10-11.) In other words, it was sufficient to stop the running of the statute of limitations.

Under the Treasury's own practice—

> "Even in the case of refund claims, where regulations in reference thereto are required by the statute, the Bureau, following the opinion of the Attorney General (14 Op. A. G. 615), has *consistently* held that an informal claim is sufficient to stop the running of the statute of limitations." (G. C. M. 499, Cum. Bul. V-2, 171, 173.) [Italics ours.]

> "In every case where an informal claim has been recognized there has been some writing submitted by the taxpayer setting forth the *general nature of his claim or information that*

> *would indicate a possible error in the computation of the tax liability* for the taxable year for which the overpayment was made." (G. C. M. 4355, Cum. Bul. VII-2, 175.) [Italics ours.]

This is but applying to claims for refund of illegally collected taxes the rule of law that where an action has once been commenced, even though the statement of the cause of action be imperfect or incomplete, an amendment making corrections or supplying omissions, whether filed before or after the statute of limitations has run, relates back to the commencement of the action.

In *Louisville & N. R. Co.* v. *Sloss-Sheffield S. & I. Co.*, 269 U. S. 217, 226-227, 70 L. ed. 242, 247, it was held that a complaint against a carrier before the Interstate Commerce Commission praying reparation on account of unreasonable rates, which did not set forth the points of origin and destination, or the dates of the shipments, or the quantities shipped, or the charges paid, or any other particulars of the claim, could be perfected by amendment after the statute of limitations had run. The opinion states:

> "It is true that the two-year requirement is jurisdictional. United States ex rel. Louisville Cement Co. v. Interstate Commerce Commission, 246 U. S. 638, 62 L. ed. 914, 38 Sup. Ct. 408. *But no statute or rule imposes upon the commission procedure so exacting as to make fatal mere failure to present within the period of limitation the detail of a statement which under the procedure prevailing in courts of law may ordinarily be supplied by amendment or a bill of particulars.*" (269 U. S. 226-227, 70 L. ed. 247.) [Italics ours.]

In *Illinois Surety Co.* v. *United States,* 215 Fed. 334, C. C. A. 4th, aff. 240 U. S. 214, 60 L. ed. 609, a suit by subcontractors in the name of the United States under the Act of Congress of August 13, 1894, an amendment supplying admittedly essential allegations (215 Fed. 338-339) was allowed over objection after the expiration of the one-year period of limitations, this Court saying:

> "No new or different cause of action was alleged in the amended complaint. The court merely permitted the defective statement of the existing right to be corrected by the addition of appropriate allegations, and in this there was no error. Rev. Stat. § 954, Comp. Stat. 1913, § 1591; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 576, 57 L. ed. 355, 363, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134." (240 U. S. 222-223, 60 L. ed. 615.)

In *United States* v. *Dellispine,* 15 Pet. 319, 10 L. ed. 753, the original petition was defective in substance, and an amended petition was allowed to be filed over the objection that the period of limitations had expired. This Court approved, saying:

> "• • • although the first petition was informal, and defective in substance, still, it would be too strict to say it was not the commencement of the proceeding, but that the amendment allowed by the Superior Court, in November, 1833, should be taken as the date when the claim was first preferred." (15 Pet. 329, 10 L. ed. 756.)

Applying the rule to the present case, the original claim for refund included a number of different grounds, as we have seen. The particular ground of claim in controversy, reading, "Foreign Dividends

Overstated," could only mean, as before stated, *that amounts had been included in the taxpayer's return of income for* 1917 *as dividends received from a foreign company or companies which should not have been included because not a part of income for that year.*

This, certainly, was sufficient to indicate the general nature of the claim. It was not a mere statement that taxes had been collected "in excess of the amount legally due." On the contrary, it specified the item of income that had been overstated, namely, dividends received from foreign companies.

The amended claim in alleging the name of the company paying the dividend, the amount thereof, and the reason why it was not income of the taxpayer for 1917, namely, because it was a stock dividend, supplied the particulars of the claim.

Of course, a statement of claim or complaint cannot be amended after the statute of limitations has run so as to state a new claim or cause of action.

The distinction between an amendment which merely amplifies or corrects the original statement of claim and one which states a new claim is illustrated by *Seaboard Air Line Ry.* v. *Renn,* 241 U. S. 290, 60 L. ed. 1006, an action under the Federal Employers' Liability Act. In that case, "the original complaint was exceedingly brief and did not sufficiently allege that at the time of the injury the defendant was engaged and the plaintiff employed in interstate commerce." (241 U. S. 292-293, 60 L. ed. 1008.) After the statute of limitations had run, the trial court, "over the defendant's objection, permitted the complaint to be so amended as to state distinctly the defendant's engagement and the plaintiff's employment in such commerce." (241 U.

S. 293, 60 L. ed. 1009.) This Court sustained the trial court, saying:

> "If the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action, and was not affected by the intervening lapse of time. * * * But if it introduced a new or different cause of action, it was the equivalent of a new suit, as to which the running of the limitation was not theretofore arrested." (241 U. S. 293-294, 60 L. ed. 1009.)

The amended claim in the present case meets this test. It did not state a new cause of action. It merely amplified the cause of action originally stated by giving the name of the company paying the dividend, the amount of the dividend, and the reason why it was not income of the taxpayer for 1917.

In *Missouri, K. & T. R. Co.* v. *Wulf*, 226 U. S. 570, 57 L. ed. 355, the original declaration was by the mother of an employee of the defendant, suing as sole heir and next of kin, and was based on a statute of Kansas giving a right of action for injuries resulting in death. Notwithstanding that the statute of limitations had run, an amendment was allowed in which the plaintiff asserted a right of action not only as sole beneficiary and next of kin but also as administratrix, and relied not only on the Kansas statute but also on the Federal Employers' Liability Act.

In *New York Central & Hudson River R. R. Co.* v. *Kinney*, 260 U. S. 340, 67 L. ed. 294, a complaint in an action under the Federal Employers' Liability Act which omitted to allege that the parties were engaged in interstate commerce—an essential element of the

cause of action—was allowed to be amended after the statute of limitations had run so as to make that allegation.

Referring to these cases this Court said in *B. & O. S. W. R. R. Co.* v. *Carroll, Admx.*, 280 U. S. 491, 494, 74 L. ed. 567, 574:

> "Each of these decisions proceeds upon the ground that the *amendment did not set up any different state of facts as the ground of action*, and therefore it related back to the beginning of the action. In the *Kinney* case it was pointed out that the original declaration was consistent with a wrong under either state or federal law, as the facts might turn out; and that the acts constituting the tort were the same, whichever law gave them that effect." [Italics ours.]

So, here, the amendment did not set up any different state of facts as the ground of claim. The amended claim and the original claim both alike sought a refund of 1917 taxes on the ground of the erroneous inclusion in the taxpayer's income for that year of the *same* dividend.

True, the reason alleged in the amended claim as to why it was erroneous to include the dividend in the taxpayer's income for 1917 was new, but a recovery on that theory was entirely consistent with the original statement of claim.

There is a distinction between an amendment which merely alleges a new theory or contention in support of the *same* claim or right of action and an amendment which sets up a *different* claim or right of action. (*Baltimore Steamship Co.* v. *Phillips*, 274 U. S. 316, 321, 71 L. ed. 1069, 1072; *Friederichsen* v. *Renard*, 247 U. S. 207, 210, 62 L. ed. 1075, 1083; *United States* v.

*California & O. Land Co.*, 192 U. S. 355, 49 L. ed. 476; *Clinchfield R. R. Co.* v. *Dunn*, 40 F. (2d) 586, C. C. A. 6th, certiorari denied Oct. 13, 1930, —— U. S. ——; 1 Corp. Jur. 1056-1057; *Clark on Code Pleading*, 1928, p. 518.)

In *Baltimore Steamship Co.* v. *Phillips*, the Court said:

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. *The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong.* The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action." (274 U. S. 316, 321, 71 L. ed. 1069, 1072.) [Italics ours.]

In *Friederichsen* v. *Renard*, a suit in equity to rescind a contract on the ground of fraud was converted after the statute of limitations had run into an action at law to recover damages. The theory of the original petition was that the plaintiff had elected to *disaffirm* the contract because of the fraud, and so was entitled to have it rescinded, with incidental damages. The theory of the amended petition was that the plaintiff had elected to affirm the contract, but nevertheless was entitled to damages for the fraud—not only a new theory but an inconsistent one. Upholding the amended petition this Court said:

> "The cause of action is the wrong done, not the measure of compensation for it, or the character of the relief sought, and, considered as a matter of substance, the change in the statement

> of that wrong in the amended petition cannot, in any just sense, be considered a new or a different cause of action.'' (247 U. S. 210, 62 L. ed. 1083.)

That is, the wrong done the plaintiff—the cause of action—was the fraud practiced upon him, and stating a new theory for obtaining redress was not stating a new or different cause of action.

In *United States* v. *California & O. Land Co.*, cited with approval in *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 319-320, 71 L. ed. 1069, 1071, a bill in equity filed pursuant to an act of Congress to have certain land patents declared void on the ground or theory of a forfeiture for noncompliance with the conditions of the grant, and a subsequent bill to have the same patents declared void on the entirely *different ground or theory* that the lands covered by the patents were within an Indian Reservation and therefore not within the terms of the grant, were held to state the *same cause of action*, so that a judgment of dismissal in the first case barred the second.

In *Clinchfield R. R. Co.* v. *Dunn*, 40 F. (2d) 586, C. C. A. 6th, certiorari denied October 14, 1930, — U. S. —, the defendant was sued under the Federal Employers' Liability Act as the successor of the Carolina, Clinchfield & Ohio Railway Company for a tort committed by the latter. After the statute of limitations had run an amended petition was allowed to be filed which went on the theory that the defendant was liable, not as the successor of the Carolina, Clinchfield & Ohio Railway Company, but by the terms of a lease under which it operated the latter's railway. The Court, citing cases in this Court in support of its position, said:

> "* * * That the cause of action is supported by a different law, or by application of different principles, under the amendment, does not show that a different cause of action is declared upon. * * * Much latitude of amendment is properly allowed to save the cause of action, if possible, from the bar of limitations. This is especially so where, as here, there is reasonable ground for holding the amendment to be only an amplification and expansion of the cause of action, as the defendant itself must have always recognized it was intended to be prosecuted." (P. 587.)

So, in the present case, only *one* claim or right of action was asserted—*the right to recover an overpayment of income and war excess profits taxes for* 1917 *caused by including as a part of the taxpayer's income for that year a dividend which was not such.*

That was the gist of the original and of the amended statement of claim alike. The latter in asserting that the dividend was a stock dividend did not set up any new claim but merely advanced a new theory or contention in support of the claim already stated, i. e., a new theory or contention as to why the dividend was not a part of the claimant's taxable income for 1917.

It follows that the amended statement of claim related back to the filing of the original statement of claim and was not barred by the statute of limitations.

In cases like *Union Pacific Ry. Co.* v. *Wyler,* 158 U. S. 285, 39 L. ed. 983, the amended petition which was rejected stated a new and distinct *right of action* and not merely a new *theory or contention* in support of the right of action stated in the original petition. In that case, as observed in *Cincinnati, N. O. & T. P. Ry. Co.* v. *Gray,* 101 Fed. 623, 631, C. C. A. 6th, "The stat-

ute which supported the claim made in the amended petition had created a cause of action entirely different from the one arising at common law, set up on the original petition. The court, upon that ground alone, held that there was a departure, and that the plea of the statute of limitations would therefore prevent the relief sought by the amended petition."

The Government makes two objections to the amended claim. The first, that the amendment attempts to introduce a new claim or cause of action (Govt. Br. 13), has just been answered. (*Ante*, —.)

The other objection is:

> "That the second claim is not an amendment of the first is further shown by the fact that the claim states that the money, of which the respondent seeks refund, was paid on September 6, 1923 (R. 11), which was after the date of the original claim. A claim for refund can relate only to taxes paid prior to the date of the claim." (Govt. Br. 13-14.)

Of course, a claim for refund can relate only to taxes paid prior to the date of the claim. But the statement that the money which the respondent seeks to have refunded was paid on September 6, 1923, is not correct. The money which the respondent seeks to have refunded, as the findings show (Finding VI, Rec. 13), is the $498,961.29 of 1917 taxes erroneously collected from it by reason of the inclusion of a stock dividend in its 1917 return. Taxes assessable against the respondent on the face of its 1917 return were due not later than June 15, 1918 (Revenue Act of 1917, § 14 (a); Reg. 33, art. 230), and, nothing appearing to the contrary, it will be presumed that they were collected when due. In fact, taxes assessed on that

return to the amount of $5,328,164.72 were paid on or about that date.

The statement in the second claim that *one* payment of 1917 taxes was made on September 6, 1923, referred to an additional assessment (Findings X, XII, Rec. 14, 16), and was merely to lay the foundation for the alternative contention that if the second claim should be read as stating a new claim, and not merely as an amplification of the first, it was still in time because filed within four years of the last payment of 1917 taxes.

This Court has said that the statute and regulations relating to claims for refund were devised, "not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial." (*Tucker* v. *Alexander,* 275 U. S. 228, 231, 72 L. ed. 253, 256.)

The original claim in this case, as amended, completely fulfilled this purpose. It not only stated the facts—the ground of claim—but the legal contention relied upon.

## Conclusion.

The judgment of the Court of Claims should be affirmed.

Respectfully submitted,

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JANUARY, 1931.

# APPENDIX.

## Statutes and Regulations.

Revised Statutes, § 3226, as amended, U. S. C., Tit. 26, § 156, provides:

> "No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, * * * until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax * * * has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, * * * unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. * * *"

Section 252 of the Revenue Act of 1921 provided, with reference to crediting and refunding overpayments of income, war-profits and excess-profits taxes collected under the Revenue Act of 1917,

> "That if, upon examination of any return of income made pursuant to this act, * * * the Revenue Act of 1917, or the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be cred-

> ited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided*, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: * * *."

Section 284 (b) (1) of the Revenue Act of 1926 provided:

> "No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; * * *."

Subdivision (h) of the same section provided, with an exception not material here, that—

> "this section shall not bar from allowance a claim for credit or refund filed prior to the enactment of this Act which but for such enactment would have been allowable, * * *."

Regulations 62, art. 1036, under the Revenue Act of 1921, provided:

> "Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. * * *."

Regulations 69, art. 1304, under the Revenue Act of 1926, provided:

> "Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843. All facts relied upon in support of the claim should be clearly set forth in detail under oath. * * *."

# SUPREME COURT OF THE UNITED STATES.

No. 56.—October Term, 1930.

The United States, Petitioner, *vs.* Swift and Company. } On Writ of Certiorari to the Court of Claims.

[February 2, 1931.]

Mr. Justice Roberts delivered the opinion of the Court.

This was an action by respondent for the recovery of the amount of an admitted overpayment of income and war profits taxes for the taxable year 1917, with interest.

In its return for 1917 respondent included the value of stock dividends received. February 28, 1923, it filed a claim for refund, alleging that the dividends in question should have been allocated to other years than 1917. The claim was rejected. Subsequently this court decided that stock dividends did not constitute income, as defined by the Sixteenth Amendment (*Eisner* v. *Macomber*, 252 U. S. 189). September 3, 1927, respondent filed a second claim for refund which it designated as an amended claim, and therein for the first time asserted that the dividends did not constitute taxable income. The Commissioner of Internal Revenue determined that the latter claim was barred by the statute of limitations and rejected it.

The respondent's position is that the second claim should be construed as an amendment of the first; but, if not, then, treating the second as an original claim, it was filed within the time required by law and should have been allowed. The Court of Claims overruled respondent's first contention, but held with it upon its second, and entered judgment in its favor. Upon the petition of the United States this court granted a writ of certiorari.

If the Court of Claims was right in its disposition of respondent's second contention we need not trouble ourselves with respect to the first. It is admitted that if the later claim for refund was filed in time the respondent should recover. The sums of which a refund is sought were not paid in cash, but consisted of a credit of an amount overpaid for other taxable years. Whether the claim was filed in due time depends, therefore, upon a determination of the

date when the credit was allowed within the meaning of the statutes. Section 252 of the Revenue Act of 1921 (42 Stat. 268) contains the following provision:

"That if, upon examination of any return of income made pursuant to . . . the Revenue Act of 1917, . . . it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided*, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: . . ."

The applicable portion of Section 284 (b) (1) of the Revenue Act of 1926 (44 Stat. 66) follows:

"No such credit or refund shall be allowed or made after . . . four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer: . . ."

Under the quoted statutes the respondent was required to file its claim within four years from the date of the allowance of the credit. The petitioner asserts that the credit was allowed on February 9, 1923, when the Commissioner certified the overassessment to the Collector. The respondent insists that it was when the Commissioner signed the schedule of refunds and credits as reported by the Collector on September 6, 1923. The earlier date is more than four years from the filing of the claim, and the later one is within said period.

The issue thus raised will be resolved by determining what act constituted the allowance of the credit. Proper decision requires an understanding of the procedure followed in such cases.

The record discloses that the practice of the Bureau was in the first instance to examine the taxpayer's return and if it disclosed an overassessment to prepare for the Commissioner a so-called certificate of overassessment, which when certified by the Deputy Commissioner went to the Commissioner. When the Commissioner had accumulated a number of such certificates with respect to taxpayers in a single collection district, a form called a schedule of overassessments was prepared, one line on such schedule dealing

with each taxpayer's account for the taxable year in question. On this schedule was noted the overassessment of the taxpayer and blanks were left for further entries by the Collector of the district. To it was attached a subsidiary schedule, called a schedule of refunds and credits, on which the Collector should make report of his actions pursuant to the schedule of overassessments, and these two schedules, together with the individual certificates of overassessment, were forwarded to the Collector. On the schedule of overassessments were certain printed instructions as follows:

"The several amounts herein noted as reduction of tax liability are hereby approved and allowed.

"You will immediately check the items herein against the accounts of the several taxpayers and determine whether the several amounts in which the tax liability has been reduced should be abated in whole or in part and make such abatement as may be warranted by the condition of the taxpayer's account for the year involved.

"If any part of the tax is found to be an overpayment, you will examine all accounts of the taxpayer for subsequent periods and apply such overpayment as a credit against the tax owing (if any) on the taxpayer's account for subsequent periods. (This applies to income, war-profits and excess-profits taxes only.)

"The balance (if any) of the overpayment shall be entered in column 12 and placed upon a schedule of refunds (Form 7777A) and an appropriate memorandum made upon the taxpayer's account.

"You will thereupon complete and certify this schedule and Schedule 7777A and return three copies of each to the Commissioner of Internal Revenue at Washington, making the appropriate entries in your accounts."*

The Commissioner, when he forwarded these papers to the Collector, had no way of knowing whether the overassessment would bring about an abatement of taxes theretofore assessed and unpaid, or would result in an overpayment by the taxpayer. This could only be ascertained by the Collector from the books and records kept by him. Moreover, after the Collector ascertained whether an overpayment resulted, he would have to determine from his books and records the further question whether such overpay-

*At the time here in question the schedule of refunds, Form 7777A, referred to in the last two paragraphs of these instructions, had been changed to a schedule of refunds and credits, Form 7805A.

ment should be applied as a credit on taxes due or, in the absence of any taxes due, ought to be refunded.

When the Collector had completed his investigation and filled in the information as to abatement, overpayment, credit and refund on the schedule of assessments, and the subsidiary schedule of refunds and credits, he certified the correctness of these schedules and returned them, together with the certificates of overassessment, to the bureau in Washington. There the schedule and certificate were examined by the Deputy Commissioner, checked by him to ascertain whether they were correct, and forwarded by him to the Commissioner of Internal Revenue for action. On the basis of his deputy's certificate the Commissioner would certify the schedule of refunds thus directing the disbursing clerk of the Treasury to draw checks for refunds shown on the schedule and checks for the interest, if any, on such refunds and on credits. Meantime the amounts shown on the schedule with respect to each taxpayer's account had been copied on the certificate of overassessment of that taxpayer, and when checks had been prepared for refunds and interest, if any, the certificate of overassessment, together with the checks, were sent to the Collector to be by him mailed to the taxpayer. The first official notification which the taxpayer received as to how his account had been handled with respect to abatement, credit, refund and interest was the certificate of overassessment which accompanied the check for the payment due him, if any. If there were no payment due him he received a certificate of overassessment with the amount of the credit which had been allowed him noted upon it. It is true that this certificate of overassessment stated that credit would be given, refund would be made, etc., whereas the credit had already been given and the refund check accompanied the certificate when it reached the taxpayer, but we do not think this affects the question of the date of allowance.

One of three dates may possibly be considered the date of the allowance of the credit,—that on which the Commissioner forwarded the schedule of overassessments to the Collector, that on which the Collector finished his calculations and entered the amount of the credit in the taxpayer's account, or that on which the Commissioner approved the schedule of credits and refunds. The petitioner insists upon the first and the respondent upon the last as the date of allowance of the credit; alternatively the United States

says that if the first be not the date of the allowance the intermediate one is.

In *Girard Trust Company* v. *United States*, 270 U. S. 163, this court, after adverting to the above mentioned procedure, said:

"We can not concur, however, in the view of the Treasury Department that the date of the allowance of the claim as intended by the statute is the date when the Commissioner first decides that there has been an overassessment and sends upon a proper form his decision to the Collector of Internal Revenue, who made the collection and keeps the account with the taxpayer. . . ."

In the same case it was also said:

"The Commissioner of Internal Revenue is the final judge in the administrative branch of the Government to decide that an overassessment has been made and that a refund or credit should be granted, and when he has made that decision finally, he has allowed the claim for the refund or credit of the taxes paid within the meaning of the section."

It is conceded that the quoted language applies to the present case, but petitioner points out that it was used in a case in which only the date of allowance of a refund was involved. It is urged that as respects the allowance of a credit it was *dictum:* that conceding its correctness with respect to the date of allowance of a refund, different considerations apply with respect to a credit. The petitioner argues that as was stated in the *Girard Trust Company* case the last significant act done by the Commissioner is to authorize the refund, that being in fact made by the drawing of a check by a clerk and the mailing of a check by the Collector, whereas in the case of a credit the last act of authorization is the forwarding of the schedule of overassessments to the Collector, who then does the mere ministerial act of making the necessary calculations and ascertaining and entering the proper amount of the credit on his books and on the schedule of refunds and credits which is to be returned to the Commissioner. It insists that when the schedule of refunds and credits is returned to the Commissioner he does authorize the drawing of checks for refunds, but does nothing whatever with respect to the credits shown on the schedule, merely filing it for reference. There is evidence, however, that the subordinates of the Commissioner check the calculations shown on the schedules when they are returned to the Bureau; that the Deputy Commissioner certifies the correctness of the schedule to the Commissioner; and that the official record of the credit is the

schedule approved by the Commissioner and filed in his office. Moreover, the final act so far as the taxpayer is concerned is the receipt from the Collector of the certificate showing how the overassessment has been applied.

When he executes the schedule of overassessments the Commissioner has no knowledge as to what the Collector's account with the taxpayer shows. He does not know whether the overassessment will be entirely used up in abatements, or whether, if an overpayment is shown, it will have to be apportioned partly as a credit and partly as a refund. It is true that the Commissioner's directions to the Collector are that the latter shall examine the accounts and make the proper allocations, and it is true that the Collector's action in so doing is ministerial. But after that clerical work is performed the practice requires the return to the Commissioner of a statement or schedule of the allocations, the approval of that schedule by him, and the mailing of the certificate of overassessment, executed on his behalf, to the taxpayer. There is nothing in the record to indicate that the Commissioner might not order corrections to be made in the accounts of the taxpayer prior to the mailing of this certificate. The proofs do not disclose that he has not in practice done so. As the sole discretion and authority to allow a credit rests with the Commissioner, we think that, in the light of the procedure above outlined, his approval of the schedule of credits and refunds must be taken to be the final exercise of that discretion and the allowance of the credit. This construction of the act brings about uniformity in administration, as it makes the allowance of credits and refunds simultaneous.

It results that even though the second claim for refund filed by the respondent be treated not as an amendment of its original claim of 1923, but as a new and independent claim, it was filed within four years of the payment of the tax, since that payment must be taken to have occurred on the date of the allowance of the credit by the Commissioner's signature approving the schedule of refunds and credits. Such approval was given as respects the credit to respondent on September 6, 1923, which was within four years of the date of the filing of the second claim.

The views herein expressed make it unnecessary to decide whether the later claim may properly be considered an amendment of the original claim for refund.

The judgment of the Court of Claims is affirmed.